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Ronald J. Chilton and David Glaizer, et al. v. Allen K. Young; Young Kester and Petro; Gerry L. Spence; Lynn C. Harris; Spence Moriarity and Schuster; Jonah Orlofsky; and Plotkin and Jacobs : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

RONALD J. CHILTON AND DAVID GLAIZER, et al., Plaintiffs and Appellants, v. ALLEN K. YOUNG; YOUNG KESTER & PETRO; GERRY L. SPENCE; LYNN C. HARRIS; SPENCE MORIARITY & SCHUSTER; JONAH ORLOFSKY; and PLOTKIN & JACOBS, Defendants and Appellees.	)	**JOINT BRIEF OF APPELLEES** Case No. 20080363-CA

APPEAL FROM SUMMARY JUDGMENTS OF THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY,
THE HONORABLE PAT B. BRIAN AND STEPHEN L. ROTH, JUDGES

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I.

INTRODUCTION

Appellants Ronald J. Chilton and David L. Glazier (hereinafter "Chilton" and "Glazier") are the two remaining Plaintiffs still asserting purported legal malpractice claims against the Defendant and Appellee lawyers in this case (hereinafter collectively "Attorney Defendants") arising out of Attorney Defendants' representation of 1,892 steelworkers in a hard-fought battle with USX Corporation ("USX") spanning several years and two lengthy trials. Chilton and Glazier accuse Attorney Defendants of fraud and malpractice even though Attorney Defendants won both trials against USX and recovered an unprecedented $47 million dollar settlement on behalf of the steelworkers.

Chilton and Glazier filed this lawsuit over five years after the settlement was consummated and the last settlement payment made to the steelworkers, alleging that Attorney Defendants were incompetent and dishonest in their representation of the steelworkers. Chilton and Glazier then claimed their first attorneys in this case, Haskins & Associates, were incompetent and dishonest, and hired the law firm of Hill, Johnson & Schmutz ("HJS") to represent them. After HJS unsuccessfully opposed two motions for summary judgment filed by Attorney Defendants, Chilton, as he had done on other occasions, contacted the district court judge directly to plead his case, and complain about HJS. When HJS then withdrew, Chilton and Glazier ultimately decided to represent themselves, claiming that HJS was incompetent and dishonest in its representation.

In their brief, Chilton and Glazier now charge that HJS, the two district court judges who handled the case and the attorneys for Attorney Defendants are all incompetent and dishonest and conspired together to deprive Chilton and Glazier of their rights. These wild, baseless charges are an affront to the legal system and cannot substitute for a reasoned analysis of the purported claims asserted by Chilton and Glazier against Attorney Defendants and a demonstration supported by citations to the record and relevant legal authority that any error was committed below.

In fact, the claims asserted by Chilton and Glazier below are meritless and were properly dismissed by Judges Brian and Roth after exhaustive briefing, multiple lengthy hearings and careful consideration. Chilton and Glazer demonstrated a remarkable talent in the district court for raising new claims as the court dismissed the claims they originally asserted. However, Chilton and Glazier have now abandoned most of the claims they asserted below. As will be demonstrated, the few remaining claims that Chilton and Glazier still attempt to assert on appeal are meritless and were properly dismissed.

II.

JURISDICTION

This appeal is taken from final summary judgments entered by the district court, the Honorable Pat B. Brian and Stephen L. Roth, Judges. This Court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78A-4-103(2)(j).

III.

ISSUES PRESENTED FOR REVIEW

The following issues are presented for review:

1. Should this Court refuse to consider Chilton and Glazier's brief or any of the arguments raised therein because Chilton and Glazier have failed to comply with Rule 24 of the Utah Rules of Appellate Procedure and have failed to adequately brief the issues?

STANDARD OF REVIEW: This issue is reviewed as a question of law. *MacKay v. Hardy*, 973 P.2d 941, 947-948 (Utah 1998).

2. The parties agreed below that whether Chilton and Glazier were entitled to 1988 vacation pay was governed by the Basic Labor Agreement ("BLA") between the Union and USX. In response to the first motion for summary judgment, plaintiffs conceded that plaintiffs were discharged on August 31, 1987 and therefore did not meet the requirement of Section 12A.3 of the BLA that they be employed as of January 1, 1988 in order to receive vacation pay in 1988. However, they erroneously contended that two appendices to the BLA amended section 12A.3 to provide for vacation pay. The issue presented is whether Judge Brian correctly granted Defendants' first motion for summary judgment on the ground that under Section 12A.3 of the BLA Chilton and Glazier were not entitled to 1988 vacation pay because they were no longer employees of USX as of January 1, 1988 and the appendices did not amend that section.

STANDARD OF REVIEW: The district courts' interpretation of the BLA on summary judgment based upon the arguments presented is reviewed by this Court *de novo*. *Green v. State Farm Fire & Cas. Co.*, 2005 UT App 564, ¶ 16, 127 P.3d 1279.

3. Have Chilton and Glazier failed to demonstrate that Judge Roth abused his discretion in refusing to reconsider Judge Brian's granting of the first summary judgment motion or to grant a new trial with respect to the 1988 vacation pay claim that was dismissed on the first summary judgment motion?

STANDARD OF REVIEW: This Court reviews the district court's denial of a motion for reconsideration and a motion for new trial on an abuse of discretion standard. *Timm v. Dewsnup*, 921 P.2d 1381, 1386-1387 (Utah 1996); *Balderas v. Starks*, 2006 UT App 218, ¶ 13, 138 P.3d 75.

4. Have Chilton and Glazier failed to present any argument or authority to show that the second summary judgment was improperly granted by Judge Brian or that Judge Roth abused his discretion in refusing to reconsider the second summary judgment?

STANDARD OF REVIEW: The Court reviews whether Chilton and Glazier have presented any argument or authority concerning the second summary judgment as a matter of law. *Green v. State Farm Fire & Cas. Co., supra.* The Court reviews the reconsideration issue on an abuse of discretion standard. *Timm v. Dewsnup, supra.*

5. Did Judge Roth correctly grant Attorney Defendants' third motion for summary judgment, dismissing the sole remaining breach of fiduciary duty claim against

Attorney Defendants, on the basis the claim was barred by the statute of limitations and that Chilton and Glazier had not presented any evidence of individual damage?

STANDARD OF REVIEW: The district court's grant of summary judgment is reviewed by this Court *de novo*. *Poteet v. White*, 2006 UT 63, ¶ 7, 147 P.3d 439.

6. Have Chilton and Glazier failed to demonstrate that the protections of the Sixth Amendment with respect to effective counsel in criminal cases applies to this case or that their counsel below, HJS, rendered ineffective counsel?

STANDARD OF REVIEW: An ineffective assistance of counsel claim made for the first time on appeal presents a question of law. *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162, 163.

IV.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

None.

V.

STATEMENT OF THE CASE

A. Nature of the Case And Course of Proceedings Below.

Attorney Defendants represented 1,892 former steelworkers at USX Corporation's ("USX") Geneva Works steel plant, including Chilton and Glazier, in a titanic battle with USX lasting over eight years and through two lengthy trials before the Honorable Bruce

S. Jenkins, in both of which trials Attorney Defendants were successful for their clients.[1] [R. 387-389]

After the first trial, Judge Jenkins ruled in 1992 that USX had violated ERISA by failing to recall certain categories of the Plaintiff steelworkers during the period following the end of a work stoppage on January 31, 1987 until USX sold Geneva to Basic Manufacture and Technologies, Inc. ("BM&T") on August 31, 1987. [R. 387 and R. 396-397] After the second trial, Judge Jenkins issued his decision in 1995 (the "Jenkins Decision") ruling that all but two of the 24 "bellwether" Plaintiffs, whose claims were considered to be typical of the different categories of the remaining Plaintiffs, were entitled to recover back pay from USX during varying periods between February 1 and August 31, 1987 based on the dates that Judge Jenkins ruled each individual bellwether Plaintiff should have been recalled to work by USX, less income earned by each bellwether Plaintiff from other sources during his or her damage period. The ***amount*** of damages each bellwether Plaintiff was entitled to recover and the damage claims of the remaining many hundreds of steelworkers remained to be tried. [R. 388 and R. 396-499]

As a result of this remarkable effort, Attorney Defendants were finally able to obtain a settlement which avoided the need for hundreds of trials over a period of several years. Under the Settlement Agreement, USX Corporation agreed to and did in fact pay

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[1] Judge Jenkins' decision on liability after the first trial is reported in *Pickering v. USX Corp.*, 809 F. Supp. 1501 (D. Utah 1992). Judge Jenkins' decision after the second trial is found at R. 396.

$47 Million in cash in two installments in September 1995 and March 1996 and agreed to certain pension benefits for the steelworkers. The settlement with USX gave the steelworkers everything that the Jenkins Decision would have given them after many more years of litigation. [R. 389-391] USX also agreed to pay an additional $3.714 Million above actual damages based upon Attorney Defendants' argument to USX that Judge Jenkins would probably ultimately award the steelworkers attorneys' fees, although in ERISA actions the court has discretion whether to award attorneys' fees to either party and attorneys' fees are not to be awarded as a matter of course. [R. 754, ¶11]

After full disclosure of the terms of the settlement in written documents and during a lengthy meeting held with the steelworkers at Mountain View High School on June 28, 1995, the 1,677 settling steelworkers[2] ***unanimously*** approved the settlement in writing and released Attorney Defendants from any liability in connection with the settlement. [R. 389, ¶¶ 8-10; R. 752-756] The steelworkers were paid every dime of their settlement. [R. 755-756]

Despite the truly landmark victory won by Attorney Defendants for their clients, a small fraction of the steelworkers, initially represented by Haskins & Associates, filed this lawsuit in July 2001 - - a full six years after the settlement - - making meritless claims against attorney Allen Young concerning the settlement that all steelworkers unanimously

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[2] After the first trial, 208 retired steelworker plaintiffs (who then settled their claims) and 18 "layoff" steelworker plaintiffs had been dismissed so that 1,677 plaintiff steelworkers remained. [R. 1825]

accepted so many years ago. Three years later, in 2004, all but 38 of the approximately 218 Plaintiffs obtained new counsel, HJS, and filed a Third Amended Complaint, adding the remaining Attorney Defendants as Defendants nine years after the settlement. [R. 249]

The genesis of the lawsuit, and the principal claim originally asserted by Plaintiffs against Attorney Defendants, was that Attorney Defendants misrepresented that the USX settlement would give the Plaintiffs everything that the Jenkins Decision would give them and more, but that representation was allegedly false because the Jenkins Decision allegedly gave Plaintiffs vacation pay to be paid in 1988 but the settlement did not. [*See, e.g.*, R. 253-259] On September 22, 2005, Judge Pat B. Brian issued his Memorandum Decision granting Attorney Defendants summary judgment dismissing that claim. [Appellees' App. A at R. 934] Judge Brian ruled that as a matter of law all of the steelworkers were effectively discharged as USX employees when USX sold the Geneva plant to BM&T effective August 31, 1987 and no steelworkers were entitled to vacation pay in 1988 because under the BLA between USX and the United Steelworkers of America a steelworker was not entitled to vacation pay in 1988 if he or she was no longer employed by USX on January 1, 1988. [Appellees' App. A at R. 942-944]

Attorney Defendants then filed a second joint motion for summary judgment on the Plaintiffs' remaining alleged claims for fraud, legal malpractice-breach of contract, legal malpractice-breach of fiduciary duty, legal malpractice-negligence and an accounting. [R. 947-1305] In response to the motion, the 38 Plaintiffs still represented

by Haskins & Associates, having had their claims for 1988 vacation pay which generated the lawsuit dismissed by Judge Brian, voluntarily dismissed their claims with prejudice. [R. 1709-1723] The remaining approximately 180 Plaintiffs represented by HJS attempted to stay in court by asserting a hodgepodge of supposed wrongdoing by Attorney Defendants which they argued entitled them to relief. The remaining Plaintiffs resorted to asserting new claims in opposition to the second summary judgment motion that were not even alleged in their Third Amended Complaint. [R. 1315-1571 and R. 249-275]

After voluminous briefing and lengthy oral argument, Judge Brian dismissed all of the Plaintiffs' claims for fraud, malpractice-breach of contract, malpractice-negligence and an accounting. [R. 1823; Appellees' App. B] Judge Brian also dismissed all but one of the Plaintiffs' malpractice-breach of fiduciary duty claims. The sole "claim" not dismissed was Plaintiffs' vague and ill-defined claim that Attorney Defendants somehow breached their fiduciary duty by the manner in which they created and implemented a hearing process by which steelworkers who believed they had been damaged more than the average steelworker in their category could seek to share in a fund of approximately $2.3 Million by demonstrating to former Judge Scott Daniels in an informal, non-adversarial hearing that they had been damaged more than the average steelworker or that special facts or circumstances existed which justified an additional award. [*Id.* at 1843]

Judge Brian retired shortly after his second summary judgment decision. Judge Stephen L. Roth was then assigned the case. Months later, Chilton went around his attorneys to argue his case directly to Judge Roth in a letter.[3] [R. 1858] On June 30, 2006, HJS then withdrew as counsel for Chilton and Glazier. [R. 2221-2231] After initially objecting to the withdrawal [R. 2232 and 2236], Chilton and Glazier withdrew their objection on September 29, 2006, telling Judge Roth that HJS had done Chilton and Glazier a favor by withdrawing and requesting to act *pro se*. [R. 3333-3334]

On August 16, 2005, many months after Judge Brian had granted the second summary judgment motion and after Judge Brian had retired, Chilton and Glazier, then acting *pro se*, filed a motion for reconsideration, asking Judge Roth to reconsider Judge Brian's granting of both the first and second summary judgment motions. [R. 2405] HJS then filed a motion for reconsideration on behalf of all of the plaintiffs that firm continued to represent, but only asked for reconsideration of the first summary judgment dismissing the vacation pay claim. [R. 3070]

Attorney Defendants opposed the motion for reconsideration and, after conducting discovery by way of interrogatories, filed a third motion for summary judgment, asking Judge Roth to dismiss the sole remaining breach of fiduciary duty claim. [R. 2614-3047] After extensive briefing by HJS, Chilton and Glazier and Attorney Defendants, Judge Roth heard Attorney Defendants' objection to the reconsideration motion on February 9,

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[3] Chilton had previously written a letter directly to Judge Brian arguing his case and complaining about his first counsel, Haskins & Associates. [R. 1859]

2007. [R. 3928] After hearing argument from HJS, Chilton and Glazier and Attorney Defendants, Judge Roth ruled there was no basis for him to reconsider Judge Brian's decisions, and that the motions were untimely and he refused to reconsider. [R. 4167; Appellees' App. C]

Attorney Defendants' third motion for summary judgment was fully briefed by HJS on behalf of its remaining plaintiff clients. [R. 3797] Chilton and Glazier joined in and adopted the arguments asserted by HJS. [R. 3781] The remaining Plaintiffs then followed the lead of Chilton and Glazier by firing HJS and appearing *pro se* so that all of the Plaintiffs were then representing themselves *pro se*. [R. 3942-4369; Appellants' Brief at p. 9] The third motion for summary judgment was set for hearing by Judge Roth on September 17, 2007. [R. 4426 and R. 4824] On the eve of the hearing, Chiton and Glazier filed a motion to continue the hearing, which Judge Roth denied. [R. 4422 and R. 4675] After a lengthy hearing attended by scores of the Plaintiffs, Judge Roth took the motion under advisement. [R. 4824]

On March 15, 2008, Judge Roth issued his written decision granting the motion and dismissing Plaintiffs' sole remaining breach of fiduciary duty claim. [R. 4675; Appellees' App. D] Judge Roth ruled that the claim was barred by the four-year statute of limitations for breach of fiduciary duty. Judge Roth further ruled that Plaintiffs had failed to provide any evidence of any damage with respect to their claims, except, perhaps, for a very small claim (barred by the statute of limitations) that Attorney Defendants had

allegedly permitted former Judge Scott Daniels during the informal hearing process to make some small awards to certain steelworkers that were not within the scope of the Jenkins Decision.

Summary judgment was subsequently entered in favor of Attorney Defendants dismissing this action on April 2, 2008. [R. 4768] Chilton and Glazier timely filed their *pro se* Notice of Appeal on April 18, 2008. [R. 4803] No other Plaintiffs appealed the summary judgment.

B. Statement of Facts.

1. Judge Jenkins determined in the 1995 decision that all but two of the bellwether steelworkers were entitled to recover "an award of back pay (wages, sick leave, vacation pay, incentive pay or other employee compensation) equal to the compensation [he or she] would have received during the periods of recall to employment at Geneva set forth above [which were various dates between February and August 31, 1987], less any amount of income earned by [him or her] through other employment during those same periods." [R. 388, ¶ 6; *see, e.g.*, the Jenkins Decision at *56, R. 435-436]

2. After Judge Jenkins issued his decision, lengthy settlement negotiations were conducted with USX. As a result of those negotiations, USX made an offer to settle with the steelworkers by paying $47 Million in addition to recognizing the pension benefits to which the steelworkers were entitled. [R. 388-389, ¶ 7]

3. Attorney Defendants mailed a letter on June 19, 1995 to each of their clients informing them of the settlement proposal and that a meeting would be held on June 28, 1995 at Mountain View High School to fully discuss the settlement offer and answer any questions. The letter specifically notified the steelworkers that "it is very important that as many plaintiffs as possible vote on accepting or rejecting USX's offer of settlement. We therefore request that you make every effort to attend the settlement meeting, as the vote at the meeting will bind each of you." [*Id.*] [Emphasis in original] [R. 751, ¶ 4; R. 759]

4. Two days later, on June 21, 1995, Attorney Defendants sent out another letter to all of the steelworkers informing them of the settlement offer and the settlement meeting to be held. The letter contained a general description of the settlement offer and the hearing process. The letter also attached a form entitled "Total Gross Payout by Group" [*see* Appellees' App. E] outlining what each steelworker would receive before attorneys' fees and taxes were deducted. [R. 752, ¶ 5; R. 761-762]

5. On June 28, 1995, Attorney Defendants held a meeting with the steelworkers at Mountain View High School in Orem, Utah to explain and discuss the terms of the settlement and have the steelworkers vote on the settlement. [R. 389, ¶ 9; R. 752, ¶ 6] A written transcript was made of the meeting which was relied upon by all parties below. [R. 586]

6. Approximately 1,200 steelworkers attended the June 28, 1995 settlement meeting. Attorney Defendants encouraged the steelworkers to ask any questions they had

so that they would understand the agreement and what was happening. [R. 999, ¶ 11; R. 1119-1121]

7. At the settlement meeting, the steelworkers were told that the settlement offer gave them in excess of the amount of money that they would get under the Jenkins Decision. [R. 1119-1120]

8. The steelworkers were informed at the settlement meeting that the different groups of steelworkers would receive at a minimum the gross amounts reflected on the "Total Gross Payout by Group" chart given the steelworkers reflecting the average damage of the steelworkers in that particular category. [R. 999-1000; Appellees' App. E] A "Hearing Worksheet for Idling Plaintiffs" was handed out showing exactly how Attorney Defendants calculated damages for the idling Plaintiffs group which totaled approximately 1,320 steelworkers and Attorney Defendants explained the calculations step by step. [R. 1000 and 1211; Appellees' App. F] In calculating the lost wages, an average steelworker was entitled to under the Jenkins Decision, Attorney Defendants used a multiplier of .53, representing the portion of the year 1987 during which the average bellwether steelworker should have been recalled by USX according to the Jenkins Decision and therefore the portion of the year during which the average bellwether steelworker was entitled to recover lost wages as damages. [Appellees' App. F]

9. At the settlement meeting, Attorney Defendants explained to the steelworkers that those steelworkers who believed they had lost more than the average steelworker in their category could request a hearing before an independent former judge,

Scott Daniels, who would have approximately $2.3 Million total to distribute limited to a maximum recovery of $25,000 per steelworker. The steelworkers were told that Attorney Defendants believed that the $2.3 Million would pay all of the additional requests but that if it did not then the steelworkers "would be prorated down a little bit." [R. 1000, ¶ 12; R. 1150-1155][4] If a steelworker could prove he or she should have been recalled sooner than the average bellwether steelworker, he or she could seek additional damages in the hearing process. [R. 622-624]

10. All of the approximately 1,200 steelworkers present at the meeting voted "yes" to approve the settlement. All of the 1,677 remaining steelworker Plaintiffs eventually voted "yes" to approve the settlement. [R. 1001-1002]

11. Attorney Defendants sent a letter to all steelworkers on July 20, 1995 informing them of a schedule when the steelworkers were to come to the backyard of Allen Young's law office to read and review the Settlement Agreement, confirm the amount each steelworker was to receive, receive an explanation of the hearing process and sign a written release so payments could begin. All 1,677 steelworkers signed the ballot and the release and each received a copy of the Settlement Agreement. [R. 1002-1003, ¶ 18; R. 1283]

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[4] As it turned out, the $2.3 Million was several thousand dollars short of paying all of the steelworkers' claims. Attorney Defendants contributed this shortfall from their own funds. [R. 2627-2628]

12. USX made the settlement payments in two installments in 1995 and March 1996. Each steelworker received an accounting entitled "Final Gross Payout by Group" and all but a few steelworkers signed a settlement summary acknowledging the correctness of the payments received. [R. 1003-1004; *see* Appellees' App. G and H]

13. Approximately 428 steelworkers participated in the hearing process before Judge Daniels. 366 steelworkers received additional awards. Those that participated in the hearing process represented themselves and most of the awards involved only an arithmetic computation. For the most part, Judge Daniels awarded money according to the limitations set forth in the Jenkins Decision. [R. 1833 at 11; R. 1000-1001, ¶¶ 13-14] Chilton participated in the hearing process and received approximately $9,721.57. [R. 1001, ¶ 15]

14. USX had sold the Geneva steel plant to BM&T effective August 31, 1987. The steelworkers union, United Steelworkers of America (the "Union"), approved that sale. Thus, in the Jenkins Decision, he determined that the sale was legal, that all of the Plaintiff steelworkers were terminated by USX as of August 31, 1987, and thus they were not entitled to recover any damages after that date. [R. 390, ¶ 12; the Jenkins Decision, at *41, R. 1035]

15. The BLA between USX and the Union governed the steelworkers' right to vacation pay. Section 12 of the BLA governed vacations. Under Section 12A.3 of the BLA, an employee "even though otherwise eligible . . . forfeits the right to vacation

benefits under this Section if he quits, retires, dies or is discharged prior to January 1 of the vacation year." [R. 390; § 12A.3 of BLA, R. 503-507]

16. None of the steelworkers were employed by USX as of January 1, 1988. As stated above, Judge Jenkins determined that USX had legally terminated all of the steelworkers effective August 31, 1987. [R. 390, ¶ 14; the Jenkins Decision at *41, R. 1035]

VI.

SUMMARY OF ARGUMENT

This court in its discretion can refuse to consider the purported issues raised by Chilton and Glazier on appeal because they have failed to comply with Rule 24 of the Utah Rules of Civil Procedure in numerous respects and have failed to adequately brief the issues. However, even if the court determines to consider the issues raised by Chilton and Glazier, the arguments asserted by Chilton and Glazier are without merit.

The first summary judgment dismissing the 1988 vacation pay claim was properly granted because under the BLA Chilton and Glazier were only entitled to such vacation pay if they remained employees of USX as of January 1, 1988. It is undisputed that Judge Jenkins held that all of the steelworkers were terminated on August 31, 1987 when USX sold Geneva to BM&T. The only two arguments raised by Chilton and Glazier in opposition to the first summary judgment motion, namely, that Section 12A.3 of the BLA was amended by two appendices were without merit and have now been abandoned on appeal.

Chilton and Glazier have failed to even attempt to shoulder their burden in demonstrating that Judge Roth abused his discretion in refusing to reconsider the first summary judgment on the 1988 vacation pay issue or to provide any argument or authorities on the issue. In fact, Judge Roth acted well within his discretion as Chilton and Glazier presented no basis for reconsideration and the motion was untimely. In this regard, Judge Roth acted well within his discretion in refusing to consider Chilton and Glazier's new "discharge" versus "termination" argument for the first time on the motion for reconsideration especially because their attorneys had intentionally decided not to make that argument in opposition to the first motion for summary judgment and the argument contradicted their original argument. Because Chilton and Glazier did not timely raise this argument below, it was waived and was not preserved for appeal.

Moreover, even if the "discharge" versus "termination" argument had been timely raised, the argument is without merit. There is not a special definition of those terms in the BLA and the courts have recognized that the terms "discharge" and "termination" are synonymous. An employee can be discharged or terminated with or without cause. There is no difference.

Other than to state the bald conclusion that they should be given a new trial on "all issues," Chilton and Glazier have not provided any argument, authority or supporting citations to the record to challenge Judge Brian's granting of the second summary judgment on all remaining issues except for one breach of fiduciary duty claim or to demonstrate that Judge Roth abused his discretion in refusing to reconsider the granting

of the second summary judgment by Judge Brian. There is no basis for overturning these decisions.

Judge Roth properly granted Attorney Defendants' third summary judgment motion on the remaining claim that Attorney Defendants had breached their fiduciary duty in the manner in which they created and implemented the hearing process because Chilton and Glazier failed to show any individual damage and because the entire claim was barred by the four year statute of limitations. As Judge Roth correctly determined, there was no basis for applying the discovery rule. Chilton and Glazier knew or should have known back in 1995 or 1996 of the facts upon which their breach of fiduciary duty claim was based. Moreover, Chilton and Glazier failed to show that they did not and could not have learned of their purported claim in time to file it within the statute of limitations.

Finally, there is no basis for the inadequate representation claim asserted by Chilton and Glazier. Chilton and Glazier intentionally chose to represent themselves *pro se*. The protections of the Sixth Amendment in this regard do not apply to civil cases. Chilton and Glazier's remedy, if any, would be a malpractice action against their former counsel. Moreover, even if the Sixth Amendment cases applied in the civil context, Chilton and Glazier are required, but have failed, to demonstrate inadequate representation.

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V.

ARGUMENT

A. CHILTON AND GLAZIER HAVE FAILED TO COMPLY WITH RULE 24 AND TO ADEQUATELY BRIEF THE ISSUES.

Chilton and Glazier have violated Rule 24 in at least the following respects:

(1) Chilton and Glazier have failed to set forth in their Statement of Issues Presented all of the issues raised by their brief or to set forth the standard of review for each issue, or to cite to the record to demonstrate that they preserved the issues below. For example, Chilton and Glazier fail to include as issues whether Judge Roth abused his discretion in refusing to reconsider the first and second summary judgments and to consider Chilton and Glazier's new argument made for the first time on their motion for reconsideration that there was a difference between "terminate" and "discharge" under the BLA, or to set forth the standard of review of the denial of a motion for reconsideration.

(2) Chilton and Glazier fail in their Statement of the Case and Statement of Relevant Facts to cite to the record, except for a few general references to documents attached in their appendix.

(3) Chilton and Glazier's "Statement of Relevant Facts" is less a statement of facts than it is simply a rehash of their arguments.

(4) In their Summary of Argument, Chilton and Glazier fail to summarize the arguments actually raised in their brief.

(5) Chilton and Glazier improperly attempt to rely on argument contained in memoranda included in their addenda to evade the 50 page limitation for their brief. *See, Aspenwood, LLC v. C.A.T, LLC*, 2003 UT App 28, ¶ 45, 73 P.3d 947, 957.

(6) Chilton and Glazier have also failed to adequately brief any of the purported issues they raise in their brief. Their argument on the issues is in large part almost indecipherable,[5] and lacking the citation of applicable legal authority or citation to the record. Their argument on most issues is little more than a claim that the issue was wrongly decided without explanation or analysis. For example, Chilton and Glazier argue at length that Judge Brian incorrectly ruled they were not entitled to vacation pay to be paid in 1988 because they were effectively discharged by USX before January 1, 1988. They argue that there is an alleged difference between "terminate" and "discharge" under the BLA and that they were only "terminated," not "discharged," before January 1, 1988. However, this argument was not raised by Chilton and Glazier until their motion for reconsideration ten months after the vacation pay claim was dismissed. Chilton and Glazier provide no authority or argument that Judge Roth erred in refusing to reconsider the vacation pay issue or to consider the new argument asserted by Chilton and Glazier. This omission is especially glaring in view of the fact Chilton

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[5] For example, they argue that "terminate cannot be the same as discharge even if one were to find that discharge is the same as terminated." [Appellants' Brief at p. 38]

and Glazier admit and affirmatively argue their counsel knew of this argument at the time of the first summary judgment motion and intentionally elected not to assert it.

This court in its discretion can refuse to consider the purported issues raised by Chilton and Glazier on appeal both because their brief fails to comply with Rule 24 of the Utah Rules of Appellate Procedure in numerous respects and because they have failed to adequately brief the issues.

This court has been more lenient with *pro se* litigants, but they are still required to comply with the court's rules. If a *pro se* litigant fails to comply with the rules and to provide "reasoned and supported analysis" of the issue "in relationship to relevant statutory law and case law" this court is justified in refusing to consider the issues raised or in dismissing the appeal. *See, Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co.,* 909 P.2d 225, 230 (Utah 1995) (Supreme Court refused to consider an issue based on inadequate briefing by *pro se* appellant); *MacKay v. Hardy*, 973 P.2d 941, 947-948 (Utah 1998); *Smith v. Four Corners Mental Health Ctr., Inc.*, 2003 UT 23, ¶ 46, 70 P.3d 904, 916; *Valcarce v. Fitzgerald,* 961P.2d 305, 313 (Utah 1998) (Supreme Court refused to consider an issue not adequately briefed by a *pro se* appellant); *West Jordan City v. Goodman,* 2006 UT 27, ¶ 29, 135 P.3d 874, 882; *Caffery v. Taylor*, 2006 UT App 487 (unpublished) ("as a general rule, a party who represents himself will be held to the same standard of knowledge and practice as any qualified

member of the bar."). However, even if the court elects to consider the issues raised by Chilton and Glazier, their arguments are without merit, as will now be demonstrated.

B. THE FIRST SUMMARY JUDGMENT MOTION ON THE 1988 VACATION PAY CLAIM WAS PROPERLY GRANTED.

The principal claim made by Chilton and Glazier below and on appeal is that Attorney Defendants' representation that the steelworkers would receive in the settlement everything that the Jenkins Decision would eventually give them after hundreds of trials was false because the settlement did not give them vacation pay to be paid in 1988.

Attorney Defendants and plaintiffs agreed below that Judge Jenkins ruled that the steelworkers were all terminated on August 31, 1987 when USX sold Geneva to BM&T and that the BLA governs whether they have a right to vacation pay in 1988. However, as Judge Brian correctly ruled, the steelworkers' claim to vacation pay to be paid in 1988 is based upon a fundamental misconception of the provisions of the BLA. Contrary to what Chilton and Glazier argue without support in their brief, Judge Jenkins did not award the steelworkers vacation pay to be paid in 1988 because they were clearly not entitled to vacation pay under the BLA between the Union and USX.

For the bellwether steelworker plaintiffs that prevailed, Judge Jenkins specified various periods that they should have been recalled to work by USX between the February 1, 1987 end of the lockout and the August 31, 1987 sale of the plant by USX to BM&T. For each such plaintiff, Judge Jenkins awarded, using the following identical language, the back pay, including any vacation pay, that plaintiffs would have received

during the period each such plaintiff should have been recalled during that period of February 1 through August 31, 1987:

> Ms. Ault has established her entitlement to "other appropriate equitable relief" on Ms. Ault's claims under § 502(a)(3) of ERISA, 29 U.S.C.A. § 1132(a)(3) (1985) "to redress such violations" includes an award of back pay (wages, sick leave, vacation pay, incentive pay or other employee compensation) equal to the compensation she would have received ***during the periods of recall to employment at Geneva set forth above*** [Ms. Ault's period of recall was March 31, 1987 through August 31, 1987]. [Emphasis Added] [Jenkins Decision at *56, R. 435-436]

Judge Jenkins reiterated this point when discussing the relief he was awarding:

> The Court reaffirms its earlier ruling that "***the proper measure of individual relief*** is dependent upon USX's actual treatment of each Geneva employee," and ***that plaintiffs are entitled to § 502(a)(3) relief "as if Geneva had not been idled" and "up to the moment in time in which USX lawfully shutdown, sold, or otherwise disposed of Geneva."*** 809 F. Supp. at 1552. Allowing for the June 1987 agreements between USX, BM & T and the USWA requires that plaintiffs' § 502(a)(3) remedies "must be measured within the terms of the 1987 BLA, [and] Pension Agreement, ***as if [plaintiffs] had remained active employees who were terminated when Geneva was sold to BM & T," (id.) That is, on August 31, 1987***. [Jenkins Decision at *41, R. 425] [Emphasis added]

Judge Jenkins could not have been more clear. He was awarding back pay, including vacation pay, sick leave, etc., that the prevailing bellwether steelworkers would have received during 1987. He never awarded any benefits that might have been received in 1988.

Moreover, Judge Jenkins's ruling specifically precludes the possibility of an award of vacation pay in 1988 because of its reference to the BLA. While the BLA provides that working a certain amount of time in 1987 may entitle a steelworker to vacation pay to

be paid in 1988, ***this is only true if the worker is still an active employee of USX on January 1, 1988***. This is made clear by Section 12A.3 of the BLA:

> An employee even though otherwise eligible under this Subsection A, forfeits the right to receive vacation benefits under this Section if he quits, retires, dies, or ***is discharged prior to January 1 of the vacation year.*** [Emphasis added]

Judge Jenkins ruled that all of the steelworkers at Geneva **were legally terminated by USX as of August 31, 1987**, which explains why Judge Jenkins carefully limited the back pay award to benefits that would have been received in 1987.

Contrary to what they now argue, Chilton and Glazier and all the other Plaintiffs ***conceded*** in opposition to Attorney Defendants' first summary judgment motion relating to the 1988 vacation pay claim that Judge Jenkins ruled that all of the steelworkers were terminated on August 31, 1987 ***and that under Section 12A.3 of the BLA they would not be entitled to 1988 vacation pay because they were terminated prior to January 1, 1988.*** [R. 576-579] Chilton and Glazier attempted, however, to salvage their vacation pay claim by making the argument that a "Letter Agreement on 1987 Vacation Eligibility" attached as part of Exhibit D to the steelworkers' Opposition Memorandum [R. 698] somehow amended section 12A.3 and entitled them to 1988 vacation pay. To the contrary, as the title of the Letter Agreement makes clear, that letter only related to ***1987*** vacation

eligibility.[6] The letter has no bearing on ***1988*** vacation pay. ***Understandably, Chilton and Glazier have now abandoned this argument on appeal.***

The only other argument raised by Chilton and Glazier below in opposition to the first summary judgment motion was that a "Letter Agreement Regarding Geneva Works Feasibility Study" that was attached as Appendix QII to the BLA [R. 697], also amended section 12A.3 and provided for 1988 vacation pay. To the contrary, the Works Feasibility Study Letter Agreement had nothing to do with vacation pay, but only constituted a joint commitment by USX and the Union to participate in the work of the Geneva Advisory Board to study and review the feasibility regarding "market conditions for Geneva as a steel-making facility." [R. 697] ***Again, Chilton and Glazier have abandoned this argument on appeal.***

In short, the steelworkers did not present a scintilla of evidence or any legal authority to support their position on 1988 vacation pay and Chilton and Glazier have now abandoned the only two arguments they raised in opposition to the first summary judgment motion. Judge Brian correctly entered summary judgment on this claim.

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[6] USX had illegally locked out the steelworkers from August 1986 through January 1987. The Letter Agreement was necessary to preserve the steelworkers' rights to receive vacation pay in 1987 that they otherwise may have lost because of the lockout.

C. CHILTON AND GLAZIER HAVE FAILED TO SHOW THAT JUDGE ROTH ABUSED HIS DISCRETION IN REFUSING TO RECONSIDER JUDGE BRIAN'S GRANT OF THE FIRST SUMMARY JUDGMENT MOTION ON THE 1988 VACATION PAY CLAIM.

After the 1988 vacation pay claim was dismissed by Judge Brian, Attorney Defendants filed their second motion for summary judgment on the remaining claims, which built upon the previous summary judgment entered on the vacation pay claim. Plaintiffs did not at that time challenge in any respect Judge Brian's prior ruling dismissing the 1988 vacation pay claim. Then, in August 2006, seven months after Judge Brian granted the second summary judgment motion dismissing all but one narrow alleged breach of fiduciary claim, and more than 10 months after Judge Brian dismissed the 1988 vacation pay claim, and after Judge Brian had retired, Chilton and Glazier filed a *pro se* motion to reconsider both of Judge Brian's decisions. The supporting memorandum was obviously written by HJS with several handwritten additions by Chilton. [*See,* R. 2238, R. 2405 and R. 3070] HJS also filed a motion to reconsider the summary judgment on the vacation pay claim on behalf of all the Plaintiffs that firm still represented. [R. 3070]

The only new evidence that Chilton and Glazier claimed to have below to justify reconsideration was a single 1988 pay stub issued by USX to one steelworker which they erroneously claimed demonstrated steelworkers were entitled to 1988 vacation pay, contrary to Judge Brian's decision on the first summary judgment motion. [R. 2422-2423] ***Chilton and Glazier have abandoned on appeal this purported ground for***

reconsideration. That is not surprising given that the pay stub was irrelevant. It made no reference whatsoever to "vacation pay" and there was no foundation for any contention that it did. [R. 2605] Indeed, there was no foundation for the entire document and Chilton and Glazier made no showing that this pay stub could not have been submitted to the court over a year earlier in opposition to Attorney Defendants' first motion for summary judgment.

The only other purported ground for reconsideration relied upon by Chilton and Glazier below was an entirely new argument never raised before Judge Brian that the term "terminated", as used in the Jenkins Decision, was somehow different than the term "discharged" as used in section 12A.3 of the BLA. Chilton and Glazier argued they were therefore entitled to 1988 vacation pay because they were not "discharged" prior to January 1, 1988; they were only "terminated."

Judge Roth correctly refused to consider the new "discharge" versus "termination" argument and to reconsider the 1988 vacation pay claim because Chilton and Glazier were completely unable to demonstrate any basis for reconsideration.[7] Instead, Chilton and Glazier simply wanted a second bite at the apple. Judge Roth ruled that the motion was untimely because it was not made for over ten months after summary judgment was granted and until months after a second summary judgment motion, which built on the first summary judgment, was granted, and there was no excuse for the delay. Judge Roth

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[7] Attorney Defendants will discuss later in this brief the motion to reconsider insofar as it dealt with Judge Brian's second summary judgment. [*See* pp. 31-33, *infra*]

further ruled that plaintiffs' counsel had known about the possibility of making the "termination" versus "discharge" argument at the time of the first summary judgment motion and had intentionally decided not to make the argument. [R. 4186-4196, *see* Appellees' App. C] ***Indeed, Chilton and Glazier repeatedly stated below that they had tried to convince HJS to raise this argument in opposition to the first summary judgment motion but HJS intentionally decided not to make it.*** [R. 3245; R. 4187, n. 7; Appellees' Brief at pp. 12-13] Furthermore, as Judge Roth noted, Plaintiffs' counsel had failed to dispute Attorney Defendants' implied argument that "termination" and "discharge" are equivalent or to mention or provide Judge Jenkins any sections of the BLA they later argued governed. [R. 4180-4181 and R. 4187]

In fact, the new argument was contradictory to Chilton's and Glazier's original argument. Their original argument was that although they would not be entitled to vacation pay under Section 12A.3 because they were discharged on August 31, 1987, two appendices amended that section to provide for vacation pay. As Chilton and Glazier argued, "the steelworkers assert that Section 12-A-3 and the application thereof was amended via adoption of the new eligibility criteria set forth in" the appendices. [*See* R. 576-579] Chilton and Glazier were correct that under section 12A.3 of the BLA they were not entitled to 1988 vacation pay but they were incorrect that the appendices amended that section to entitle them to vacation pay.

Judge Roth had considerable discretion in deciding whether to reconsider the prior summary judgment entered by Judge Brian and acted well within his discretion in

refusing to do so. Chilton and Glazier are required to demonstrate on appeal that Judge Roth abused his discretion in refusing to reconsider the first summary judgment on the vacation pay issue. *Timm v. Dewsnup*, 921 P.2d 1381, 1386-1387 (Utah 1996). Judge Roth's decision may only be overturned if there is no reasonable basis for his decision. *See, Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, ¶ 16, 163 P.3d 615, 616. Untimeliness alone justifies the denial of a motion to reconsider. *Id.* Chilton and Glazier have been unable in their brief to articulate any reason why Judge Roth abused his discretion in refusing to reconsider Judge Brian's decision. In fact, they do not expressly argue that Judge Roth erred in refusing to reconsider the prior order and they ignore their burden to demonstrate adequate grounds for reconsideration and to show an abuse of discretion.

Litigation is not a best two out of three match. A party is not entitled to file a motion for reconsideration simply hoping for a better result or to try on for size new arguments that could have been asserted in opposition to the original motion. Instead, a litigant can properly file a motion to reconsider where:

> (1) The matter is presented in a 'different light' or other 'different circumstances; (2) there has been a change in the governing law; (3) a party offers new evidence; (4) 'manifest injustice' will result if the court does not reconsider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court. *UPC, Inc. v. ROA Gen., Inc.*, 1999 UT App 303, 990 P.2d 945, 958-959.

The new "discharge" versus "termination" argument that Chilton and Glazier raised was not based upon any relevant new evidence or a change in the law, but was

known to and could have been asserted had their counsel chosen to do so in opposition to the first summary judgment motion. Nothing had changed.

The case of *IHC Health Services, Inc. v. D & K Management, Inc.*, 2008 UT 73, 196 P.3d 588, is instructive. In *IHC*, the lower court granted summary judgment in favor of IHC. D & K subsequently filed a motion to reconsider, in which it raised a new defense against summary judgment. *Id.* at ¶¶ 12, 24. The lower court declined to consider the new defense. On appeal, the Utah Supreme Court held that the lower court acted within its discretion in refusing to consider the new defense. *Id.* at ¶ 25. *See also, MacArthur v. San Juan County*, 405 F. Supp. 2d 1302, 1305-1306 (D. Utah 2005); *Child Support Enforcement Agency v. Doe*, 91 P.3d 1092, 1099 (Haw. App. 2004); *Ragan v. Columbia Mut. Ins. Co.*, 684 N.E.2d 1108, 1115 (Ill. App. 1997).

Because Chilton and Glazier failed to timely raise the "discharge" versus "termination" argument in opposition to the first summary judgment motion, they have not preserved the issue for appeal. *See, e.g., Eldridge v. Farnsworth*, 2000 UT App 243, ¶ 33, 166 P.3d 639, 649-650 (court refused to address issue on appeal that was not before the trial court at the time it granted summary judgment); *Hart v. Salt Lake County Comm'n*, 945 P.2d 125, 130 (Utah App. 1997); *Union Rock and Materials Corp. v. Scottsdale Conference Ctr.*, 678 P.2d 453, 457-458 (1983) (court refused to consider issue raised for the first time on motion for reconsideration of summary judgment).

1. Even if the Court Were to Reach the Merits of the "Discharge" Versus "Termination" Argument, it is Without Merit.

Even if Chilton and Glazier had preserved their belated argument for appeal, it is without merit. There is no special definition of the terms "discharge" and "termination" in the BLA. The courts have recognized, contrary to the untimely argument asserted by Chilton and Glazier, that a "discharge" of an employee means "termination" of the employee. *See, e.g., Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 66 S.Ct. 1105, 1112 (1946) ("discharge normally means termination of the employment relationship or a loss of position."; *Phelps Dodge Corp. v. Brown*, 540 P.2d 651, 654 (Ariz. 1975); *Conner v. Phoenix Steel Corp.*, 249 A.2d 866, 869 (Del. 1969) ("'discharge' normally means the termination of the employment relationship . . . ."). Chilton and Glazier have not cited a single case to support their position. Chilton and Glazier apparently argue [Appellants' Brief at p. 35] that "discharge" is caused by an employee's conduct, i.e., with cause, whereas "termination" is caused by the employer's conduct, i.e., without cause.[8] That is incorrect. An employee can be considered "discharged" or "terminated" with or without reference to cause. At least in this context, the terms are interchangeable. The obvious intent of section 12A.3 of the BLA was that if a

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[8] Chilton and Glazier mistakenly rely on section 2-106(3) of the Utah Uniform Commercial Code defining the word "Termination" to attempt to support their position. Of course, article two only applies to the sale of goods. Further, section 2-106(3) defines "Termination" in the context of a power to put an end to a sales contract other than for its breach. Obviously, this definition has no applicability whatsoever to termination of the employment relationship.

steelworker was no longer employed at Geneva as of January 1, 1988, the steelworker was not entitled to a vacation in that year.

Chilton and Glazier attempt to support their position by pointing to section 8 of the BLA which provides a procedure for complaints in cases involving discharge or suspension. They apparently argue that because section 8 was not followed by USX, they could not have been discharged. [*See* Appellants' Brief at p. 38] This argument is wrong because the procedures of section 8 only apply in the case of a complaint concerning the discharge of an individual employee. In the case at bar, all Geneva employees were discharged by USX when USX sold the plant to BM&T, which sale was approved by the Union. There was no dispute concerning the discharge and section 8 had no application.

D. CHILTON AND GLAZIER HAVE FAILED TO SHOW, OR EVEN ARGUE, THAT THE SECOND SUMMARY JUDGMENT WAS IMPROPERLY GRANTED BY JUDGE BRIAN OR THAT JUDGE ROTH ABUSED HIS DISCRETION IN REFUSING TO RECONSIDER THE SECOND SUMMARY JUDGMENT.

On October 10, 2005, after the first summary judgment was granted, Attorney Defendants filed a second summary judgment motion on all remaining claims. This motion was exhaustively briefed and argued by HJS and Attorney Defendants. On January 12, 2006, Judge Brian granted summary judgment on all claims except one vague and ill-defined breach of fiduciary duty claim (which Judge Roth subsequently dismissed on the third summary judgment motion). [R. 1823; Appellees' App. B; *see* p. 7, *supra*] Chilton and Glazier do not even argue in their brief that the second motion was

improperly granted or provide any legal authority or record citations to attempt to show the second summary judgment motion should not have been granted.

Moreover, Chilton and Glazier have not argued that Judge Roth erred in refusing to reconsider Judge Brian's granting of the second summary judgment. At the same time that Chilton and Glazier moved for reconsideration of Judge Brian's granting of the first summary judgment motion on 1988 vacation pay, they also asked Judge Roth to reconsider Judge Brian's order partially granting the second motion for summary judgment a number of months after Judge Brian had granted the second summary judgment motion. Judge Roth refused to reconsider the second summary judgment because the motion was not timely, the motion merely rehashed the same arguments that Judge Brian had already rejected and the motion did not demonstrate any reason why Judge Brian's ruling should be reconsidered. [R. 4195-4196] Judge Roth noted in this regard that at the hearing on the motion for reconsideration Chilton and Glazier focused only on the vacation pay issue decided in the first summary judgment motion and did not pursue any of the issues involved in the second summary judgment motion. [R. 4196] Once again, Chilton and Glazier have failed to even attempt to set forth any adequate grounds for reconsideration or to show that Judge Roth abused his discretion in refusing reconsideration or to ever acknowledge such burden.[9]

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[9] Chilton and Glazier later moved for a new trial with respect to the vacation pay issue. In his Memorandum Decision and Order granting the third motion for summary judgment, Judge Roth denied this motion as untimely under U.R.C.P. 59(b) because it was not made within ten days of the entry of summary judgment and because it simply

Instead, Chilton and Glazier have merely stated the bald conclusion in their "CONCLUSION AND PRECISE RELIEF REQUESTED" section of their brief that they should be granted a new trial on "all issues". [Appellants' Brief at pp. 47-50] Because this request is unsupported by any argument or authority to demonstrate that the second summary judgment was improperly granted or that reconsideration was improperly denied, there is no basis for overturning these rulings. Because Chilton and Glazier have failed to raise and brief these issues in their opening brief, they have waived any right to object on appeal to the second summary judgment and the refusal to reconsider that judgement. *Allen v. Friel*, 2008 UT 56, ¶ 8, 194 P.3d 903, 907.

E. JUDGE ROTH PROPERLY GRANTED ATTORNEY DEFENDANTS' THIRD SUMMARY JUDGMENT MOTION AND DISMISSED THE SOLE REMAINING BREACH OF FIDUCIARY DUTY CLAIM.

Judge Roth granted Attorney Defendants' third summary judgment motion on the remaining claim that Attorney Defendants breached their fiduciary duty in the manner the hearing process was created and implemented on the basis that the claim was barred by the statute of limitations. [R. 4702-4716] Judge Roth also ruled that Chilton and Glazier, as well as all of the other Plaintiffs, had failed to prove any individual damages so that the only damage claim that could possibly survive even if the claim was not barred the statute

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rehashed the arguments asserted on the motion for reconsideration previously denied by Judge Roth. [R. 4716-4718] Judge Roth likewise in that same order denied the objection of Chilton and Glazier to Judge Roth's previous denial of their motion for reconsideration as simply a rehash of the prior motion. Judge Roth further granted the motion to strike the reconsideration memorandum because it contained language that was impertinent and scandalous. [R. 4718-4719]

of limitations was a very small claim (Chilton and Glazier each would theoretically have at most a 1/1677th share of the claim) that Attorney Defendants may have permitted Judge Daniels to take into account items of recovery not permitted by the Jenkins Decision with respect to a very small amount awarded to certain steelworkers. [R. 4691-4701] Judge Roth properly dismissed the remaining breach of fiduciary claim. In this regard, Chilton and Glazier conceded in opposition to the third summary judgment motion that the facts relied upon by counsel were undisputed. [R. 3802]

1. The Legal Requirements to Prove Breach of Fiduciary Duty.

In *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1290 (Utah App. 1996), this Court explained the fiduciary duties that a lawyer owes to a client:

> As fiduciaries, attorneys have a legal duty "to represent the client with undivided loyalty, to preserve the client's confidences, and to disclose any material matters bearing upon the representation [of the client]." Accordingly, an attorney's fiduciary duty is two-fold: Undivided loyalty and confidentiality [*Id.*] [Citations omitted]

In the present case, Chilton and Glazier did not allege any breach of the duty of confidentiality; the only alleged breaches were with respect to the duty of loyalty. However, Chilton and Glazier were unable to demonstrate any damages arising from breach of the duty of loyalty and they failed to assert their purported claim within the statute of limitations, as will be demonstrated below.[10]

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[10] Attorney Defendants demonstrated in the third summary judgment motion that Chilton and Glazier had failed to prove any breach of fiduciary duty on a number of other grounds. [R. 2679-2700] Because of his dismissal on the grounds of the statute of limitations and damages, Judge Roth did not reach the other grounds. [R. 4687]

2. Chilton and Glazier Did Not Meet Their Burden of Proving That Either of Them Were Damaged by the Manner in Which the Hearing Process Was Created and Implemented.

Initially, Chilton and Glazier's remaining fiduciary duty claim was properly dismissed because they were unable to meet their burden of proving they were damaged by the manner in which the hearing process was created and implemented. *See, Bennett v. Jones, Waldo, Holbrook & McDonough*, 2003 UT 9, ¶ 44, 70 P.3d 17 (affirming the granting of a motion to dismiss a malpractice claim where plaintiff could not show damages caused by the alleged breach of fiduciary duty.); *Kilpatrick*, 909 P.2d at 1290.

There were a number of categories of steelworkers who were Plaintiffs in the USX lawsuit. The two largest categories were "idling" Plaintiffs (1,320) and "recall" or "laid off" Plaintiffs (214). The minimum amount that each steelworker received in the USX settlement was based upon the damages suffered by the average steelworker in his or her particular category of steelworkers. For example, each idling steelworker received a minimum settlement of $26,500, which was the damage suffered by the average idling steelworker. Each recall or laid off steelworker received a minimum settlement of $29,500, which was the damage suffered by the average laid off steelworker. [R.1303]

Because Attorney Defendants realized that there might be steelworkers who were damaged more than the average amount, Attorney Defendants proposed to the steelworkers a hearing process before former Judge Scott Daniels pursuant to which approximately $2.3 Million of the "surplus" $3.714 Million settlement proceeds Attorney Defendants obtained from USX (by arguing Judge Jenkins would probably ultimately

award attorneys' fees) would be distributed to steelworkers who could prove that they were damaged more than the average amount or who could prove other special facts or circumstances justifying a larger award. [*See*, Statement of Fact ("SOF") No. 9-10] The maximum additional amount that a steelworker could be awarded through the hearing process was $25,000.00. This hearing process was unanimously approved by all 1,677 settling steelworkers after full disclosure. [*See,* SOF No. 10-11]

Chilton and Glazier (and the other plaintiffs) completely failed in response to interrogatories [R. 2914-2917; 2760-2761] and in opposition to the third summary judgment motion to come forward with any evidence of damage. They could only prove damage to the extent that they could prove that but for the alleged wrongdoing by Attorney Defendants they would have received more in the hearing process than was actually received. Because Chilton and Glazier failed to meet their burden of demonstrating damages as a proximate cause of Attorney Defendants' alleged wrongful conduct, the remaining breach of fiduciary duty was properly dismissed (with the minor exception noted above) on that basis alone. [R. 2670-2671]

a. The Miscalculation of Lost Wages Claim is Without Merit and the Alleged Miscalculations Could Not Have Damaged Them.

Chilton and Glazier make a vague, one page argument that Attorney Defendants breached their fiduciary duty by miscalculating "lost wages" in calculating the average lost wages in connection with the hearing process. [Appellants' Brief at pp. 39-40]

Chilton and Glazier erroneously argue that Attorney Defendants miscalculated lost wages because they used a .53 multiplier instead of .58 supposedly used by Judge Jenkins.

However, Judge Jenkins used the .58 multiplier with respect to two specific steelworkers (Christopherson and Vincent) with respect to the portion of the year 1987 he determined they should have been recalled by USX. [R. 469 and R. 484] The .53 multiplier used by Attorney Defendants was the portion of the year 1987 during which, according to the Jenkins Decision, the ***average*** bellwether steelworker should have been recalled to work at Geneva by USX. Thus, the average bellwether steelworker could recover damages in the form of lost wages for .53 of the year 1987. Allen Young testified without contradiction that the .53 multiplier "represented the average portion of 1987 (194 days) for which Judge Jenkins determined the plaintiffs were entitled to recover back pay." [R. 2626, ¶ 3] Chilton and Glazier have not demonstrated that this average was not properly calculated or that they suffered any damage because of any miscalculation. Chilton and Glazier have no claim without evidence of damage. *See*, *Kilpatrick*, 909 P.2d at 1290 (Utah Ct. App. 1996).

In this regard, the use of .53 instead of .58 could not have damaged Chilton and Glazier with respect to the manner in which the hearing process was created and implemented because that number was only used in determining the ***average*** damage of a particular category of steelworker. The steelworkers were told that if their damages exceeded that average amount they should probably request a hearing. [SOF No. 10] Applying the correct .53 percentage, Chilton and Glazier could have obtained more

money in the hearing process with a showing of less damage than they would have had to prove if .58 were used. In other words, they would only have had to show their period of recall would have been more than .53 of the year (194 days) rather than to show their period of recall would have been more than .58 of the year (212 days).[11]

The only other argument raised by Chiton and Glazier in this regard is a very vague argument that Attorney Defendants used the years 1984 through 1986 for calculating average wages when they "should have used back pay based upon income earned during pay periods in which a Plaintiff worked 80 or more hours." [Appellees' Brief at p. 40] Chilton and Glazier provide no evidentiary or legal support for this argument or any evidence of damage. Moreover, as Judge Brian specifically ruled, Attorney Defendants' calculations were fully explained to the steelworkers, both at the June 28, 1995 settlement meeting and in writing. [SOF No. 9-10]

3. Judge Roth Correctly Ruled That the Breach of Fiduciary Duty Claim Is Barred by the Four-Year Statute of Limitations.

Judge Roth also correctly held that the remaining breach of fiduciary duty claim was barred by the statute of limitations. [R. 4702-4716] The statute of limitations for breach of fiduciary duty is four years. Utah Code Ann. §78-12-25(3). *See, Russell/Packard Dev., Inc. v. Carson*, 2003 UT App. 316, ¶ 11, 78 P.3d 616. The statute of limitations generally "begins to run upon the occurrence of the last event required to

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[11] As previously stated, Chilton did recover an additional $9,721.57 in the hearing process. [SOF No. 14] It is unknown whether he recovered some or all of that amount by showing he would have been recalled sooner than the average bellwether plaintiff.

form the elements of the cause of action" and "mere ignorance of the existence of a cause of action does not prevent the running of the statute of limitations." *Williams v. Howard,* 970 P.2d 1282, 1284 (Utah 1998).

Attorney Defendants' alleged wrongful acts and omissions occurred in 1995 or at the latest by March 1996 when the second and final settlement payment to the steelworkers was made by USX and the steelworkers were given a final accounting. All of the steelworkers received their full settlement payments by March 1996. **USX made the settlement checks payable directly to each individual steelworker**. At that time, Attorney Defendants gave all of the steelworkers a full accounting of how the settlement proceeds were disbursed and of the attorneys fees paid to Attorney Defendants. [*See,* SOF No. 13] There is no evidence that Chilton or Glazier (or any other steelworker) ever objected to the accounting or requested further information. Each steelworker, including Chilton and Glazier, also signed at that time a "Settlement Summary" acknowledging that the amount of the second USX payment was correct and releasing any claims against Attorney Defendants. [*See,* SOF No. 13] The statute of limitations on the breach of fiduciary duty claim that Chilton and Glazier attempted to maintain commenced running at that time. This lawsuit was not filed until July 2001, six years after the settlement and well over five years after the final accounting was rendered. The claims are therefore barred as a matter of law, as Judge Roth ruled.

a. The Discovery Rule Is Not Applicable.

In *Williams*, the Utah Supreme Court recognized that there are three "special" situations in which the discovery rule tolls the running of the statute of limitations until the plaintiff learns of, or in the exercise of reasonable diligence should have learned of, the facts which give rise to the cause of action:

> (1) Where the application of the rule is mandated by statute; (2) where a plaintiff is unaware of a cause of action because of the defendant's misleading conduct or concealment; and (3) where application is warranted by the existence of special circumstances that would, based on a balancing test, render application of the statute of limitations unjust or irrational. [*Id.* at 1284-1285]

The *Williams* court held that as a matter of law the discovery rule did not apply to the legal malpractice claim asserted in that case because the client plaintiff learned of the facts constituting the malpractice before the statute of limitations expired. The Court explained that before the discovery rule can be applied "an initial showing must be made that the plaintiff did not know of and could not reasonably have known of the existence of the cause of action in time to file a claim within the limitation period." [*Id.* at 1285-1286]

There was no basis for application of the discovery rule in this case and Judge Roth correctly refused to apply the rule. In fact, in deciding the second summary judgment motion, Judge Brian had earlier held that the discovery rule was inapplicable to toll the running of the statute of limitations on the Plaintiffs' accounting claim. [*See,* Appellees' App. B] Both Judge Roth and Judge Brian ruled there was no proof of

concealment or exceptional circumstances and that Plaintiffs had sufficient information to determine if they had claims back in 1996 and either knew or reasonably should have known of their claims at that time. [R. 4704-4716; *see*, Appellees' App. B and D]

Judge Roth correctly ruled that Plaintiffs knew or, at the very least, should have known back in 1995 and 1996 how the hearing process was created and implemented, what money they would receive in the settlement, that they could participate in the hearing process, and whether they should have received more money in the hearing process than they, in fact, received. [R. 4702-4716] Judge Brian made the same ruling in earlier granting summary judgment on the accounting claim alleged in the Fifth Cause of Action. [R. 1846-1848] Chilton and Glazier have come up with no evidence or even argument that they did not have and should not have had such knowledge. Indeed, as Judge Roth recognized, they did not even explain when they learned of the alleged facts or the surrounding circumstances. [R. 4713-4714] Instead, they simply misdirect their argument to the knowledge they claim they lacked with respect to vacation pay, which is irrelevant to the statute of limitations issue.

Chilton and Glazier argue, but present no evidence, that they could not have known that the settlement with USX did not include any amounts for vacation pay in 1988 or that Judge Jenkins had supposedly awarded such vacation pay in time to file this case within the statute of limitations. Chilton and Glazier also argue that exceptional circumstances exist because they did not know they were owed money for 1988 vacation pay, but Attorney Defendants supposedly had such knowledge. They provide no basis for

these assertions and, further, ***these arguments are irrelevant because Judge Brian did not dismiss the vacation pay claim based upon the statute of limitations.***

F. CHILTON AND GLAZIER'S INEFFECTIVE COUNSEL ARGUMENT IS WITHOUT MERIT.

Possibly the most frivolous argument raised by Chilton and Glazier in their brief is that HJS was incompetent and rendered ineffective counsel below so that the summary judgments should be overturned. [Appellants' Brief at pp. 23-30 and 40] This argument lacks any basis in fact or law.

At the outset, Chilton and Glazier attempt in their brief to create the illusion that they were abandoned by the two law firms that represented them in this case and then forced at the last minute to act *pro se* in opposing summary judgment and seeking reconsideration and a new trial. That is not at all what happened. In fact, Chilton repeatedly went around his attorneys to argue directly to the court and complain about his attorneys. [*See, e.g.,* R. 1858 and R. 1859]

Chilton and Glazier and most of the other Plaintiffs hired HJS to represent them to replace Haskins & Associates. HJS filed a notice of appearance in July 2004, nine months before the first motion for summary judgment was filed. When HJS withdrew as counsel in June 2006, Chilton and Glazier originally objected but then in September 2006 withdrew their objections, telling Judge Roth that HJS did them a favor by withdrawing and requesting permission to represent themselves. [R. 2221-2231; R. 2232 and R. 2236; R. 3333-3334] Judge Roth, of course, permitted Chilton and Glazier to represent

themselves individually. [R. 3314] HJS still represented all of the other Plaintiffs and briefed and argued the motion for reconsideration (Chilton and Glazier also briefed this motion) and briefed the third motion for summary judgment in which opposition Chilton and Glazier joined. [R. 3070-3233; R. 3797-3890; and R. 3781] Of course, HJS had earlier fully briefed and argued the first and second summary judgment motions. [R. 552-705; R. 1315-1571; R. 4822; and R. 4823]

After HJS withdrew, Chilton and Glazier had more than sufficient time to retain new counsel but intentionally did not do so because they wanted to represent themselves *pro se*. The hearing on the motion for reconsideration which was argued by both HJS and Chilton, was not held until February 2007, almost six months after HJS withdrew as counsel for Chilton and Glazier, and the hearing on the third motion for summary judgment was not held until September 2007, almost 15 months after HJS withdrew as counsel for Chilton and Glazier. Further, Chilton and Glazier never requested any continuance to allow them to retain new counsel. They simply requested and obtained permission to represent themselves. All of the claims except the one remaining breach of fiduciary duty claim were dismissed long before HJS withdrew. The remaining breach of fiduciary duty claim was only dismissed after full briefing by HJS and oral argument by Chilton and Glazier.

To support their ineffective counsel argument, Chilton and Glazier only cite various criminal cases applying the Sixth Amendment's protections. The Sixth Amendment does not apply to civil cases. In civil actions a malpractice action is

generally the appropriate remedy. *See, Davis v. Grand County Serv. Area,* 905 P.2d 888, 894 (Utah Ct. App. 1995) *overruled on other grounds, Gillett v. Price,* 2006 UT 24, 135 P.3d 861; *Fuller v. Myers*, 2008 UT App 230 (unpublished); *Peterson v. Peterson*, 2006 UT App 199 (unpublished).[12]

Furthermore, even if the criminal ineffective counsel cases were applicable, Chilton and Glazier have not come close to showing that HJS rendered ineffective assistance that was something more than tactical decisions made by HJS; that a reasonable probability exists that Chilton and Glazier would have obtained a more favorable outcome; and that "there is such a strong likelihood that an injustice would result that good conscience requires it to be remedied." *Maltby* 598 P.2d at 342. Chilton and Glazier have failed to overcome "the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is that under the circumstances, the challenged action 'might be considered sound trial strategy.'" *State v. Garrett*, 849 P.2d 578, 579 (Utah Ct. App. 1993). They have failed to show that there

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[12] In *Maltby v. Cox Construction Co., Inc.*, 598 P.2d 336, 341-342 (Utah 1979), in a concurring opinion, three Justices expressed their view in *dicta* that although generally a "mistake, error of judgment, or negligence of counsel in presenting or defending a case is not sufficient cause of vacating a judgment and granting a new trial . . . under exigent circumstances, incompetence or negligence of counsel which appears to have resulted in an injustice will justify the granting of a new trial" if "there is such a strong likelihood that an injustice has resulted that good conscience requires it to be remedied." However, insofar as Attorney Defendants have ascertained, no Utah court (or for that matter any other court in the country) has ever granted a new trial in a civil case based upon ineffective assistance of counsel. The appropriate remedy, if any, is a malpractice action against counsel.

was no "'conceivable tactical basis'" for counsel's decisions. *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162, 163.

Chilton and Glazier argue in this regard that HJS failed to object to Attorney Defendants' "handwritten, unauthentic accounting record" which supposedly violated some unstated evidence rules. However, Chilton and Glazier do not identify any specific "accounting record" or explain how the accounting record supposedly violated any evidentiary rules, why the accounting record was inadmissible, or why this supposed improper admission of the accounting record made any difference to the outcome of the summary judgment motions.

If Chilton and Glazier are referring to the documents attached as Appendix L to their brief, each of those documents was properly authenticated and was fully admissible. Indeed, there was never any question about their inadmissibility. [R. 752, ¶ 5; R. 906 and R. 910; R. 756; R. 855; R. 755; and R. 761-762] For example, Attorney Defendants' established that on June 21, 1995 Allen Young sent a letter to all of the Plaintiff steelworkers informing them again that USX had made the settlement offer and that enclosed with the letter was a chart entitled "Total Gross Payout by Group." [R. 752, ¶ 5] This document set forth how the settlement proceeds would be distributed. There was no dispute concerning that document.

Chilton and Glazier also argue that HJS was ineffective because HJS did not raise the argument that "terminated" is different from "discharged" and they were not "discharged" from their employment. Aside from the fact that the "terminate" versus

"discharge" argument is without merit, the decision whether to raise such an argument in opposition to summary judgment was a tactical decision, which by the very cases cited by Chilton and Glazier would be insufficient to demonstrate ineffective assistance. As previously demonstrated, Chilton and Glazier have admitted and argued that HJS deliberately decided not to assert the discharge versus termination argument in opposition to the first summary judgment motion.

Finally, Chilton and Glazier have also not shown that "there is such a strong likelihood that an injustice has resulted that good conscience requires it to be remedied." In this regard, although the argument is muddled, Chilton and Glazier appear to argue that "Counsel misled Judge Brian" into believing that vacation pay ***earned*** in 1988 was involved, whereas, in fact, the issue was whether the vacation pay supposedly earned by the steelworkers in 1987 was required to be paid in 1988. However, that is precisely the issue which Attorney Defendants dealt with in their first summary judgment motion and the issue that Judge Brian decided. Judge Brian decided that the Plaintiffs were not entitled to vacation pay that may have been earned in 1987 to be paid in 1988 because no employee worked at USX on January 1, 1988, and thus "no employee qualified for the vacation pay accrued in 1987" to be paid in 1988. [R. 944][13]

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[13] Chilton and Glazier also argue that HJS was deficient because it failed to object to the supposed "incorrect formula to calculate lost wages by using the.53 multiplier instead of the .58 multiplier" that Chilton and Glazier argue, without support, should have been used. However, the multiplier argument is without basis, as explained earlier (*see* pp. 36-37, *supra)* and Chilton and Glazier have not and cannot demonstrate any damages related to this supposed failure.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the summary judgments should be affirmed.

DATED this 13th day of February, 2009.

BURBIDGE, MITCHELL & GROSS

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(continuation of fn. 13)

Chilton and Glazier also assert in a separate section of argument [p. 40], containing three lines, that HJS failed to include "lost pensions" as part of the breach of fiduciary duty claim and that such a claim was never included in the complaint. Chilton and Glazier do not even explain what this purported claim is or provide any record support that HJS or Haskins & Associates were retained to assert the claim or that the claim has any merit.

CERTIFICATE OF SERVICE

On the date below written, the undersigned hereby certifies that two (2) true and correct copies of the foregoing **JOINT BRIEF OF APPELLEES** was mailed with all first-class postage pre-paid to:

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DATED this the 13th day of February, 2009.

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Appendix A

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
WEST JORDAN DEPARTMENT

RONALD J. CHILTON, *et al.*, Plaintiffs,	:	MEMORANDUM DECISION (Defendants Motion for Summary Judgment)
vs.	:	Case No. 030105887 (Previous Case No. 020404957)
ALLEN K. YOUNG, *et al.*, Defendants.	:	Judge PAT B. BRIAN

This matter came before the Court on August 12, 2005, for oral argument on Allen K. Young (Young), Young, Kester & Petro, Gerry L. Spence (Spence), Lynn C. Harris (Harris), Spence, Moriarity & Schuster, Jonah Orlofsky (Orlofsky) and Plotkin & Jacobs, Ltd.'s (collectively as "Defendants") motion for summary judgment and related motions to strike and motion for rule 56(f) continuance. Upon considering the parties numerous briefs, arguments and the applicable law, the Court now renders the following Memorandum Decision GRANTING in part and DENYING in part the Defendants motion for summary judgment.

BACKGROUND

Plaintiffs filed this law suit against their former attorney alleging legal malpractice and fraudulent misrepresentation in litigation against Plaintiffs former employer. The Plaintiffs are all former employees of the Orem facility of United States Steel corporation ("USX") who were laid off during a "hot idle" period. Defendants were co-counsel for somewhere between 1677 and 1892 steelworkers at USX's Geneva steel plant in Orem, Utah. About thirteen percent (13%) of those former employees, who were the Defendants' clients in that matter, are now Plaintiffs in this case. In 1987, on behalf of Plaintiffs and the other former employees,

Defendants filed a law suit against USX, *Pickering v. USX Corporation*, (*Pickering*) in the United States District Court, which was assigned to Judge Bruce S. Jenkins (Judge Jenkins). The law suit filed in 1987, against USX alleged claims under ERISA that USX had idled and laid off the plaintiffs in order to interfere with their pension benefits.

Judge Jenkins bifurcated the trial as to the issues of liability and remedies. The liability phase of the trial was tried in 1991, and lasted over two months. The case was tried before the Honorable Bruce S. Jenkins in the United States District Court for the Central District of Utah. Judge Jenkins subsequently ruled that USX was liable to the vast majority of the steelworkers under certain provisions of ERISA.

In 1993, a second trial was held before Judge Jenkins. This trial lasted nineteen days. This trial was limited to the damage claims of twenty four "bellwether" steelworkers, whose claims were considered to be typical of various classes of the steelworkers. Judge Jenkins grouped the steelworkers into five categories: (i) "layoff" plaintiffs, (ii) "active" plaintiffs, (iii) "management" plaintiffs, (iv) "retired"plaintiffs, and (v) "LaRoche" plaintiffs. *Pickering* decision at 1. The bellwether steelworkers fell into four of the categories. Each category was held to be entitled to certain varying categories of damages.

After the second trial, but before Judge Jenkins issued his decision, 208 "retired" plaintiffs and 18 "layoff" plaintiffs claims were dismissed with prejudice on May 31, 1994, and January 3, 1995, respectively.

On May 8, 1995, Judge Jenkins issued his decision on the second trial. *Pickering v. USX Corporation*, 1995 WL 584372 (D. Utah). Judge Jenkins did not consider any of the bellwether claims that were "retired" plaintiffs or "layoff" (recall) plaintiffs because they had been

dismissed with prejudice on May 31, 1994, and January 3, 1995, respectively. *Pickering* decision at 3. Judge Jenkins concluded that under §502(a)(3) of ERISA, 29 USCA §1132(a)(3)(1985), equitable relief would include "an award of back pay (wages, sick leave, vacation pay, incentive pay or other employee compensation) equal to the compensation [him or her] would have received during the periods of recall to employment at Geneva, . . . less any amount of income earned by [him or her] through other employment during those same periods." *See e.g., Pickering* decision at 56.

Section 502(a)(3) remedies were to be measured in context of the 1987 BLA and Pension Agreement as if the steelworker plaintiffs were terminated when Geneva was sold to BM&T on August 31, 1987. Under the 1987 BLA, an employee was entitled to a full years vacation pay to be paid the next calendar year if the employee was employed for six consecutive months in any year. If an employee "quits, retires, dies or is discharged prior to January 1 of the vacation year" then the employee forfeits the right to receive vacation benefits. BLA at §12-A-3. The BLA was amended by Appendix R to permit eligibility if one of three conditions was satisfied, either "(1) The employee is recalled to work in 1987, (2) The employee worked between June 15, 1986, and July 31, 1986, or (3) The employee satisfied the eligibility provisions of Section 12-A-1-b of the Collective Bargaining Agreement." Appendix R is silent on the issue of forfeit.

Judge Jenkins found that USX sold the Geneva steel plant to Basic Manufacture and Technology (BM&T) effective August 31, 1987. The steelworker union, United Steelworkers of America (the Union) ratified the June 8 agreement and June 12 collective bargaining agreement with BM&T. *Pickering* decision at 5, 40. None of the plaintiff steelworkers were employed by USX as of January 1, 1988.

After Judge Jenkins decision, a settlement for $47 million was reached and a meeting was held with the steelworkers regarding the settlement. It is unclear how many steelworkers attended the meeting. At the meeting, the Defendants told the steelworkers that USX required everyone must vote "yes" to the settlement or the offer would be off the table. Trans. at 9:7-8. The Defendants also told the steelworkers that they demanded what the judge awarded and had received an amount in "excess of the amount of money that the judge granted us in his decision . . . more than the amount that the judge gave us." Trans. at 9:1-5. The Defendants told the steelworkers that "I feel with absolute confidence that what we are talking about here today represents a little bit more than what the judge awarded. We actually were able to get a little bit of a cushion on top of that." Trans. at 14:24-25; 15:1-3. The steelworkers were informed that the different groups of plaintiffs would receive, as a minimum, gross amounts reflected on a chart. Those that had "lost more than average" could request a hearing before an independent judge who would have $2.3 million to add to those settlements. The Defendants told the group that even the "retired" and "laid off" plaintiffs would receive $12,000, even though the judge awarded them nothing. Trans. at 39. At that meeting, Defendants represented that as of June 28, 1995, the costs totaled $1,354,700. Trans. at 40.

Those present at the meeting voted "yes" on the ballots and the settlement with USX proceeded. The ballots informed them that if they voted no, their counsel might withdraw and they may have to obtain new counsel.

On June 24, 1985, USX prepared a study entitled "Employee Benefit Costs Potential Shutdown of Geneva Plant," showing an estimated $169,056,000 employee benefit costs owing at the Geneva plant. *Pickering* decision at 4. On May 27, 1986, USX prepared an analysis of

"Employee Related Costs Potential Shutdown of Selected Facilities Steel and Coal Operations," which estimated employee related cost liabilities for shutdown of Geneva at $92,874,000 as of July 31, 1987, and $91,974,000 as of December 31, 1986.

PROCEDURAL HISTORY

In 2002, Plaintiffs filed the present law suit, which some Plaintiffs by and through different counsel later amended by the third amended complaint.[1] Therefore, there are two operative complaints in this litigation. The first four causes of action for all of the Plaintiffs are for: (1) fraudulent misrepresentation, (2) legal malpractice - breach of contract, (3) legal malpractice - breach of fiduciary duty, (4) legal malpractice - negligence. In the Third Amended Complaint, two additional causes of action were pled, specifically, (5) accounting, and (6) breach of trust / breach of fiduciary duty cause of action.[2]

On April 6, 2005, the Defendants filed the present motion for summary judgment attaching Young's affidavit, which included exhibits A-C. The Plaintiffs filed their opposition to the Defendants motion for summary judgment on June 2, 2005, attaching six steelworker affidavits.[3] Defendants filed a reply in support of their motion for summary judgment on July 1,

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[1] The Court notes that the law suit was filed in the Fourth District Court. However, the Fourth District Court was recused from the case by its presiding judge and the case was transferred to the Third District Court and assigned to this Department.

[2] In December 2003, prior to the third amended complaint filing, the Court considered a motion to dismiss based upon a claim that the statute of limitations had run on all of Plaintiffs causes of action. The Court treated the motion as a motion for summary judgment and concluded that genuine issues of material fact existed relating to the statute of limitations. Therefore, the Court denied the motion to dismiss.

[3] The Plaintiffs are represented by two different law firms. However, in opposing the motion for summary judgment, the parties joined and therefore are treated together in this memorandum decision.

2005, attaching Young's supplemental affidavit that included additional exhibits A-K.

That same day, Defendants filed a motion to strike portions of the steelworker affidavits. The Plaintiffs filed their opposition to the Defendants joint motion to strike portions of the steelworker affidavits on July 28, 2005. Defendants filed their reply in support of their motion to strike on August 5, 2005. That same day, Defendants also filed Young's second supplemental affidavit attaching one more exhibit.

Three days before the hearing, on August 9, 2005, the Plaintiffs filed their motion for Rule 56(f) relief. The Defendants filed three separate oppositions to the Plaintiffs motion for Rule 56(f) relief. A hearing was held on August 12, 2005.

I
MOTION TO STRIKE

The Defendants request the Court strike ten out of twelve paragraphs in the six identical steelworker affidavits. Specifically, the Defendants argue that paragraphs 2-3, 5-12, should be stricken because such statements are irrelevant, conclusory, without foundation, or inadmissible double hearsay.

The Plaintiffs argue that the statements are consistent with the allegations in the third amended complaint and are based upon personal knowledge. Therefore, the Court should not strike them.

Upon reviewing the six affidavits and paragraphs that are the subject of the motion to strike, the Court concludes that to the extent such statements are irrelevant, conclusory, without foundation or would be inadmissible double hearsay, those statements shall not be considered.

Accordingly, the Court GRANTS the Defendant's motion to strike.

II

RULE 56(f) MOTION FOR RELIEF

Only three days before the hearing and four months after the Defendants' motion for summary judgment was filed more than a month after the notice to submit was filed and the matter was scheduled for hearing, the Plaintiffs filed a motion for Rule 56(f) relief The Court concludes that such motion is untimely and therefore does not address the merits of the motion [4] Accordingly, the Court DENIES the Plaintiffs Rule 56(f) motion for relief as untimely

III
MOTION FOR SUMMARY JUDGMENT

Before addressing the merits of the Defendants motion for summary judgment, the Court must first decide the scope of the motion "[T]he moving party has [the] initial burden of informing the trial court of the basis for the motion and identifying the portions of the pleadings or supporting documents which it believes demonstrates an absence of a genuine issue of material fact " *TS 1 Partnership v Allred,* 877 P 2d 156, 158 (UT App 1994) In *Timm v Dewsnup,* 851 P 2d 1178 (Utah 1993), the Utah Supreme Court stated the following

> The moving party determines the scope of a motion for summary judgment That party decides what issues to present to the court for adjudication He or she may move for summary judgment on all or less than all of the issues raised by the complaint and answer and may also move for determination of issues raised by an counterclaim or cross-claim if he or she deems it appropriate When the moving party has decided what the scope of the motion for summary judgment shall be, rule 56 contemplates that a written motion shall be served on the opposite party setting forth with clarity the relief sought by the motion so that the opposite party may prepare to defend against it if he or she chooses to do so
>
> Summary judgment procedure is generally considered a drastic remedy, requiring strict compliance with the rule authorizing it In *Lazar v Allen*, 347 So 2d 457 (Fla Dist Ct App 1977), the court stressed the importance of

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[4] The Court notes that if there are problems obtaining discovery information, the Plaintiffs may file a motion to compel detailing the information requested and withheld, along with a good faith affidavit reflecting the efforts made by Plaintiffs to obtain the information

"scrupulously observing the notice requirements" prior to entering summary judgment. The Florida Supreme Court has observed:

> If [the requirements of the rules] are not fulfilled, both in letter and spirit, the summary judgment procedure may become a vehicle of injustice rather than a salutary medium of reaching a swift but just result on a pure matter of law, as intended by the framers of the rules. . . . *Timm v. Dewsnup, supra,* 851 P.2d at 1181.

The Defendants determined the scope of the motion for summary judgment in their initial motion and memorandum in support of their motion for summary judgment. The Defendants limited their motion to two issues: (1) whether the Plaintiffs were entitled to received 1988 vacation pay and (2) whether the Plaintiffs were entitled to attorney's fees. In support of their motion, the Defendants attached three exhibits, specifically, exhibit A - Plaintiff's responses to the Defendants interrogatories and first request for production of documents, exhibit B - the *Pickering* case decision, and exhibit C - the steelworkers agreement with USX.

The Plaintiffs filed their opposition arguing that with regard to scope, the Defendants motion failed to address a majority of the Plaintiffs claims. For example, the Defendants motion failed to address in any way the Plaintiffs issues regarding: (1) phantom clients, (2) client accounts, (3) client conflicts and (4) hearing awards. The Plaintiffs argued that the motion only addressed sub-parts of the restitution and fee issues, namely, a small subset of the restitution issues, i.e., vacation pay, and a subset of the fees issues, i.e., invalidation of the contingency fee agreements.

Defendants filed a reply in support of their motion for summary judgment attaching Young's supplemental affidavit that included additional exhibits A-K. Defendants also filed Young's second supplemental affidavit attaching one more exhibit arguing the two issues raised in its initial memoranda. Defendants argued that the other purported claims raised in Plaintiffs

opposition were without merit. The Defendants expanded significantly on these arguments at the hearing.

The Plaintiffs had no opportunity to reply under the procedural rules to the Defendants supplemental affidavits and additional twelve exhibits. The Defendants, as the moving party, determined the scope of their motion for summary judgment. Only two issues were raised by the Defendants motion. To permit the Defendants to expand the scope of their motion for summary judgment in their reply would be against the "letter and spirit" of the summary judgment rule and permitting summary judgment to be "a vehicle of injustice." Accordingly, the Court concludes that the scope of the Defendants motion for summary judgment is limited to two issues, specifically, (1) whether the Plaintiffs were entitled to received vacation pay and (2) whether the Plaintiffs were entitled to attorney's fees. However, should summary judgment be revisited with a proper pleading providing the undisputed facts and applicable law for each cause of action, the Court may grant summary judgment on some of the causes of action that were argued at the hearing.

A
VACATION PAY

Defendants argue the Plaintiffs were not entitled to receive vacation pay accrued in 1987, to be paid out in 1988, because section 12-A-3 of the BLA provides that such vacation pay is forfeited if the employees are no longer employed there on January 1, 1998. In *Pickering*, the court found that all of the steelworkers were terminated on August 31, 1987, when USX sold the Geneva steel plant to BM&T. Since no employee worked at USX on January 1, 1998, no employee qualified for the vacation pay accrued in 1987, to be payable in 1998.

In opposition, the Plaintiffs argue that they are entitled to vacation pay that accrued in 1987, because Appendix R to the BLA amended the eligibility requirements for 1987 vacation pay and therefore, the forfeit provision did not apply. Under Appendix R the Plaintiffs only had to satisfy one of the criteria to qualify for deferred vacation pay in the next year. Therefore, the Plaintiffs became eligible for deferred vacation pay in 1988, that had been vested or accrued in 1987. Specifically, the Plaintiffs argue that Appendix Q, II, reflects that in light of the "continuing concern" shared by "the Union and the Company," that USX assured the Plaintiffs that the criteria introduced *via* Appendix R would remain and did remain in place with respect to vacation years 1987-1988.

In reply, the Defendants argue that Appendix R only related to 1987 vacation eligibility and has no bearing on 1988 vacation pay. Defendants argue that Appendix Q, II had "absolutely nothing to do with vacation pay, but only constituted a joint commitment by USX and the Union to participate in the work of the Geneva Advisory Board to study and review the feasibility regarding "market conditions for Geneva as a steel-making facility." Defendants argue that there is nothing in the six steelworkers' affidavits providing that they were ever assured that Appendix R concerning 1987 vacation pay would remain in effect for 1988 vacation pay.

Under the 1987 BLA, an employee was entitled to a full years vacation pay to be paid the next calendar year if the employee was employed for six consecutive months in any year. If an employee "quits, retires, dies or is discharged prior to January 1 of the vacation year" then the employee forfeits the right to receive vacation benefits. BLA at §12-A-3. The BLA was amended by Appendix R to permit eligibility if one of three conditions was satisfied, either "(1) The employee is recalled to work in 1987, (2) The employee worked between June 15, 1986 and

July 31, 1986, or (3) The employee satisfied the eligibility provisions of Section 12-A-1-b of the Collective Bargaining Agreement." Appendix R is silent on the issue of forfeit.

Reviewing §12-A-1-b of the BLA, to be eligible for vacation pay in 1987, an employee must be employed for six months. However, such right is forfeited if the employee "quits, retires, dies or is discharged prior to January 1 of the vacation year" then the employee forfeits the right to receive vacation benefits. BLA at §12-A-3. Appendix R amends the eligibility requirements to include two additional ways to be eligible for vacation pay, but is silent on the forfeit issue. Although the Plaintiffs desire that the Court view Appendix R as striking the forfeit exception, the Court cannot do so. Appendix R addresses eligibility and therefore, amends 12-A-1-b to include two additional ways to be eligible. However, this increase in eligibility does not strike or amend the forfeit language. Appendix Q also does not strike or amend the forfeit language. Without express language striking or amending the forfeit language, the Court must read the BLA as a whole, which includes the forfeit language of §12-A-3. The Court concludes that any vacation that might have accrued in 1987, to those eligible was not payable in 1988 because such vacation pay was forfeited when they were all effectively discharged on August 31, 1987, which was prior to January 1, 1988. As found in *Pickering,* none of the plaintiff steelworkers were employed by USX as of January 1, 1988. Therefore, this Court concludes that none of them were entitled to vacation pay accrued in 1987, that was payable in 1988. Accordingly, no genuine issues of material fact exist and the Defendant is entitled to summary judgment on the limited issue of whether the Plaintiffs were entitled to vacation pay accrued in 1987, to be paid out in 1988.

B
ATTORNEY'S FEES

Defendants argue that the Plaintiffs claim for attorney's fees is without merit Specifically, the Defendant's argue that there is nothing to show that the *Pickering* court would have awarded attorney's fees under ERISA, which was significantly less than attorney's fees under the contingency fee agreements Furthermore, the ERISA attorney's fees would not have changed the Defendant's entitlement to their contingency fees

Plaintiffs claim that the Defendants argument with respect to attorney's fees is misguided Plaintiffs claims are not limited to invalidation of the contingency fee agreements Rather, Plaintiffs claim is that the Defendants mass contingency fee arrangement with the steelworkers potentially provides evidence of the Defendants intent for forcefully and assertively maneuvering the steelworkers plaintiffs into a global settlement Plaintiffs also claim that the Defendants failure to obtain a recovery of ERISA attorney's fees in the USX settlement was legal malpractice or negligence because including ERISA attorney's fees would have amounted to several million dollars in additional proceeds to Plaintiffs

Defendants reply that Plaintiffs attempt to re-work their attorney's fee claim is an "ill-defined" argument that is totally unsupported and speculative

Having reviewed the initial complaint and the third amended complaint, there is no cause of action for attorney's fees As argued by the Plaintiffs, attorney's fees are a subset or an element of several of the causes of action against the Defendants and is included in the request for damages The Defendants framed the issue as whether the Plaintiffs were entitled to attorney's fees, but since there is no cause of action for attorney's fees that is not the issue Rather, the issue relates to the causes of action alleging legal malpractice and negligence

Therefore, the issues are better framed as (1) whether there was a duty to include attorney's fees in the mass class action settlement and (2) whether failure to do so was a breach of duty. By reframing the issue, there is inadequate information provided by the parties for the Court to determine whether the Defendants had a duty to include attorney's fees in the settlement negotiations. There is also inadequate briefing to determine whether even if the Defendant's had a duty, whether failure to include attorney's fees in the mass class action settlement constituted a breach. Neither party provided case authority addressing theses two issues of (1) whether, in class action litigation, an attorney has a duty to include attorney's fees in settlement negotiations and a proposed settlement and (2) whether failure to do so would constitute a breach of duty. Failure by a moving party to identify the issue for summary judgment will render summary judgment inappropriate. *TS 1 Partnership v. Allred, supra*, 877 P.2d at 158. Defendants failed to meet their burden of identifying the issues and briefing the applicable law. Therefore, summary judgment on the issue of attorney's fees is denied.

Accordingly, the Court GRANTS in part and DENIES in part the Defendants motion for summary judgment. Specifically, the Court GRANTS summary judgment on the limited issue of whether the Plaintiffs were entitled to receive vacation pay because the Court concludes the Plaintiffs were not entitled to receive vacation pay that accrued in 1987, and was payable in 1988. The Court DENIES summary judgment on the issue of attorney's fees.

DATED this 22 day of September, 2005.

By the Court:

PAT B. BRIAN
Third District Court Judge

Appendix B

ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT SALT LAKE COUNTY
WEST JORDAN DEPARTMENT, STATE OF UTAH

RONALD J. CHILTON, *et. al.*, Plaintiffs, **vs.** ALLEN K. YOUNG, *et. al.*, Defendant(s).	**MEMORANDUM DECISION** (Defendants Second Joint Motion for Summary Judgment) Case No.030105887 (Previous Case No. 020404957) Judge PAT B. BRIAN

This matter came before the Court on January 4, 2006, for oral argument on Allen K. Young (Young), Young, Kester & Petro, Gerry L. Spence (Spence), Lynn C. Harris (Harris), Spence, Moriarity & Schuster, Jonah Orlofsky (Orlofsky) and Plotkin & Jacobs, Ltd.''s (collectively as ""Defendants"") second joint motion for summary judgment on all remaining causes of action. Upon consideration the parties numerous briefs, arguments and the applicable law, the Court now renders the following Memorandum Decision GRANTING in part and DENYING in part the Defendants motion for summary judgment .

BACKGROUND

Plaintiffs filed this law suit against their former attorney alleging legal malpractice and fraudulent misrepresentation in litigation against Plaintiffs' former employer. The Plaintiffs are

all former employees of the Orem facility of United States Steel Corporation (""USX"") who were laid off during a "hot idle" period. Defendants were co-counsel for somewhere between 1677 and 1892 steelworkers at USX''s Geneva steel plant in Orem, Utah. About thirteen percent (13%) of those former employees, who were the Defendants' clients in that matter, are now Plaintiffs in this case. In 1987, on behalf of Plaintiffs and the other former employees, Defendants filed a law suit against USX, *Pickering v. USX Corporation*, (*Pickering*) in the United States District Court, which was assigned to Judge Bruce S. Jenkins (Judge Jenkins). The law suit filed in 1987 against USX alleged claims under ERISA that USX had idled and laid off the plaintiffs in order to interfere with their pension benefits.

Judge Jenkins bifurcated the trial as to the issues of liability and remedies. The liability phase of the trial was tried in 1991, and lasted over two months. The case was tried before the Honorable Bruce S. Jenkins in the United States District Court for the Central District of Utah. Judge Jenkins subsequently ruled that USX was liable to the vast majority of the steelworkers under certain provisions of ERISA. Judge Jenkins determined that several hundred Plaintiffs who had retired prior to February 1, 1987, and some laid off Plaintiffs, lost, leaving 1,677 Plaintiffs. Before a second trial was held on damages, counsel was able to negotiate a settlement for those approximately 200 Plaintiffs in the amount of $5,000 each. Each and every retired Plaintiff settled his case.

In 1993, a second trial was held before Judge Jenkins. This trial lasted nineteen days. This trial was limited to the damage claims of twenty-four "bellwether" steelworkers, whose claims were considered to be typical of various classes of the steelworkers. Judge Jenkins grouped the steelworkers into five categories: (i) "Layoff" plaintiffs, (ii) "active" plaintiffs, (iii)

"management" plaintiffs, (iv) "retired" plaintiffs, and (v) "LaRoche" plaintiffs. *Pickering* decision at 1. The bellwether steelworkers fell into four of the categories; only the "retired" category of plaintiffs were not represented by a bellwether plaintiff. The reason the "retired" steelworkers were not considered in Judge Jenkins decision is because after the second trial, but before Judge Jenkins issued his decision, 208 "retired" plaintiffs and 18 "lay off" plaintiffs claims were dismissed with prejudice on May 31, 1994, and January 3, 1995, respectively. The four remaining categories were each held to be entitled to certain varying categories of damages.

On May 8, 1995, Judge Jenkins issued his decision on the second trial. *Pickering v. USX Corporation*, 1995 WL 584372 (D. Utah). Judge Jenkins determined that all but two of the 24 bellwether steelworkers were entitled to recover certain damages. Judge Jenkins did not consider any of the bellwether claims that were "retired" plaintiffs or "layoff" (recall) plaintiffs because they had been dismissed with prejudice on May 31, 1994, and January 3, 1995, respectively. *Pickering* decision at 3. Judge Jenkins concluded that under §§502(a)(3) of ERISA, 29 USCA §§ 1132(a)(3)(1985), equitable relief would include "an award of back pay (wages, sick leave, vacation pay, incentive pay or other employee compensation) equal to the compensation [him or her] would have received during the periods of recall to employment at Geneva, . . . less any amount of income earned by [him or her] through other employment during those same periods." *See e.g., Pickering* decision at 56. Judge Jenkins reserved decision on attorneys' fees.

Judge Jenkins found that USX sold the Geneva steel plant to Basic Manufacture and Technology (BM&T) effective August 31, 1987. The steelworker union, United Steelworkers of America (the Union) ratified the June 8 agreement and June 12 collective bargaining agreement

with BM&T. *Pickering* decision at 5, 40. Judge Jenkins found that none of the plaintiff steelworkers were employed by USX as of January 1, 1988. Section 502(a)(3) remedies were to be measured in context of the 1987 BLA and Pension Agreements as if steelworker plaintiffs were terminated when Geneva was sold to BM&T on August 31, 1987.

After Judge Jenkins' decision, a settlement for $47 million was reached and a meeting was held with the steelworkers regarding the settlement. The settlement was approved by all the steelworkers and the money was paid out to each steelworker in two payments. The final payment was made in March 1996. The Plaintiffs' claims all relate to the settlement agreement and the Defendants' handling thereof.

PROCEDURAL HISTORY

In 2002, Plaintiffs filed the present law suit, which some Plaintiffs by and through different counsel later amended by the third amended complaint. One group of Plaintiffs are represented by Haskins & Associates. These Plaintiffs have dismissed their claims. The other group of Plaintiffs are represented by Hill, Johnson & Schmutz ("HJS Plaintiffs"). The HJS Plaintiffs filed the third amended complaint which is the operating complaint for the present second motion for summary judgment. The HJS Plaintifs allege six causes of action, specifically, (1) fraudulent misrepresentation, (2) legal malpractice--breach of contract, (3) legal malpractice—breach of fiduciary duty, (4) legal malpractice—negligence, (5) accounting, and (6) breach of trust/breach of fiduciary duty cause of action.

On April 6, 2005, the Defendants filed a motion for summary judgment. Defendants also

filed a motion to strike portions of the steelworkers affidavits on July 1, 2005. Three days before the hearing, on August 9, 2005, the Plaintiffs filed their motion for Rule 56(f) relief. A hearing was held on August 12, 2005. The Court issued a decision granting the Defendant's motion to strike portions of the six steelworkers' affidavits. The Court found the motion for Rule 56(f) was untimely and denied the motion. Finally, the Court decided the summary judgment motion was limited by the Defendants in their motion for summary judgment to the issues of (1) whether the Plaintiffs were entitled to receive 1988 vacation pay and (2) whether the Plaintiffs were entitled to attorneys' fees. The Court granted the Defendants' summary judgment motion on the issue of vacation pay, but denied it on the issue of attorneys' fees because Defendants failed to meet their burden of identifying the issues and briefing the applicable law.

On December 5, 2005, the Haskins Plaintiffs were dismissed with prejudice under Rule 41(A).

On December 12, 2005, the Defendants filed their Second Joint Motion for Summary Judgment on all Remaining Claims of Plaintiffs and a Memorandum in Support of this motion. The HJS Plaintiffs, the only remaining plaintiffs, filed a Memorandum in Opposition to Second Joint Motion for Summary Judgment of Defendants. The Defendants filed a Reply Memorandum in response. Oral arguments on the second motion for summary judgment were heard January 4, 2006.

UNDISPUTED RELEVANT FACTS

Defendants were co-counsel for about 1,800 steelworkers at USX's Geneva steel plant in Orem, Utah. Defendants were hired in 1987 to represent the steelworkers in a lawsuit alleging

ERISA violations. Counsel represented the steelworkers individually on a contingency fee basis; each individual steelworker signed the Fee Agreement.[1] (Young Affid. ¶3). The Fee Agreement provides that Allen K. Young entered into an agreement with the client "for the purpose of representing client in any and all claims that he may have arising out of the interruption or termination of his employment relationship with USX Corporation." (Young Affid. Ex. A). The Fee Agreement stated: "Should the matter proceed to trial, Lawyers shall receive 33 1/3% of any settlement or judgment obtained." *Id.* Furthermore, the Fee Agreement specifically provided that: "Client understands that he is one member of a class of similar plaintiffs and agrees to abide by the decisions of a simple majority (51%) of that class." *Id.*

After the two trials were held before Judge Jenkins, Counsel for Plaintiffs and USX entered into settlement negotiations. A settlement offer of $47 million plus recognition of the pension benefits the steelworkers were entitled to was eventually made by USX. The Defendants mailed a letter on June 19, 1995 to each of their clients informing them of the settlement proposal. (Young Affid. Ex. C). The letter informed the steelworkers of a meeting to be held June 28, 1995 at Mountain View High School Gymnasium (Settlement Meeting) to fully discuss the settlement offer and answer any questions. The letter also stated: "It is very important that as many plaintiffs as possible vote on accepting or rejecting USX's offer of settlement. We therefore request that you make every effort to attend the settlement meeting, as the vote at the meeting will bind each of you." *Id.* (emphasis in original). The letter also specifically stated that the Defendants and USX agreed on what the Jenkins Decision meant for each of the

[1] Plaintiffs dispute that every steelworker signed the Fee Agreement, however, not one of the 22 affidavits Plaintiffs provide say the affiant steelworker did not sign the agreement.

steelworkers, and USX has "offered to pay the plaintiffs sums that reflect the full value of the Judgment." *Id.* Two days later, on June 21, 1995, Mr. Young sent out another letter to all of the steelworkers informing them of the settlement offer and settlement meeting to be held. (Young Affid. Ex. D). The letter contained a general description of the settlement offer and hearing process, and an accompanying form titled "Total Gross Payout by Group" outlining what each steelworker plaintiff would receive before attorneys' fees and taxes were deducted. In addition, the letter says, "Assuming that we can work out some technical details with USX, we will be asking you to vote to accept the offer at that time." *Id.*

On June 28, 1995, the settlement meeting was held. Approximately 1,200 steelworkers attended the meeting. At the meeting, the Defendants told the steelworkers that USX required everyone must vote "yes" to the settlement or the offer would be off the table. (Trans. at 9:7-8; Young Affid. ¶8).[2] Defendants discussed at length that each person has the right and power to vote "No" and stop the settlement for the entire group. Trans. at 9. Spence said, "So you have the power, but you have the responsibility. . . . Now is it possible that we could have 1,699 [out of about 1,700 steelworkers] vote yes and one vote no and that USX would go along with that? That's possible. Is it possible if two vote no that USX will still go? That's possible. But if one votes no and they don't want to go, they don't have to . . ." Trans. at. 10:3-7. The Defendants also encouraged the steelworkers to ask questions so they would understand the settlement

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[2] Plaintiffs dispute that USX ever conditioned the offer on 100% acceptance, but Plaintiffs have not provided one piece of evidence to the contrary. In fact, besides the Affidavit of Mr. Young, the letter written by Defendant Lynn C. Harris on July 20, 1995 and sent to all steelworkers specifically says that Counsel was "able to get USX to modify its settlment offer to accept the offer on behalf of 1675 our of the 1677." (Young Affid. Ex. K).

agreement and what was happening. Trans. at 11:15-12:2.

The Defendants also told the steelworkers that they demanded what the judge awarded and had received an amount in "excess of the amount of money that the judge granted us in his decision . . . more than the amount that the judge gave us." Trans. at 9:1-5. The Defendants told the steelworkers that "I feel with absolute confidence that what we are talking about here today represents a little bit more than what the judge awarded. We actually were able to get a little bit of a cushion on top of that." Trans. at 14:24-25; 15:1-3. Young also stated at the meeting that the calculations they made "[d]oesn't make everybody whole, but it makes everybody whole according to Judge Jenkins' decision." Trans. at 23:20-21.

The steelworkers were informed that the different groups of plaintiffs would receive, as a minimum, gross amounts reflected on the "Total Gross Payout by Group" chart. The minimum payment each steelworker would receive was based upon the average damage of the steelworkers in that particular category. Trans. at 29-38. A "Hearing Worksheet for Idling Plaintiffs" was handed out showing exactly how the Defendants calculated the damages for this group, which totaled around 1,320 steelworkers, and the Defendants explained the calculations step by step. (*Id.*; Young Affid. Ex. F) Those that had "lost more than average" could request a hearing before an independent former judge, Scott Daniels, who would have $2.33 million total, limited to a maximum recovery of $25,000 per steelworker who successfully appeals, to add to those settlements. Trans. at 41-42. Mr. Young told the steelworkers, " . . . based on Judge Jenkins' order, . . ., based upon all of the bellwether idling plaintiffs, there is none of them that an additional $25,000 would not make 100 percent whole according to Judge Jenkins' decision. . . .

I truly believe that the 2.3 million will pay all of the additional requests. . . . If by chance that didn't cover it, then you would be prorated down a little bit." Trans. at 42, 44.

The Defendants told the group that even those plaintiffs, described by Defendants as the "LaRoche," "Managers," and "Recalled Idling" plaintiffs, who received nothing under the Jenkins Decision would receive $12,000 under the terms of the settlement.[3] Trans. at 39. Several steelworkers asked if the $12,000 being paid to those steelworkers who lost was coming out of the prevailing steelworkers' settlement. In response, Young said, "The answer is no. You've got your average, you've got your appeal procedure if you think you're entitled to more than average, and these extra monies were in effect the attorneys' fees that are thrown back in that are your money." Trans. at 49:12-18. In addition, the Defendants directed the steelworkers to the Gross Payout handout that shows the $12,000 was included in the settlement. (Young Affid. Ex. D).

At the meeting a steelworker asked why USX was not paying attorneys' fees. Defendants responded that Judge Jenkins did not award attorneys' fees, but that the Defendants used the argument that attorneys' fees would likely eventually be awarded if the case continued to leverage more money out of USX for the settlement. Trans. at 49. Defendants did point out that if attorneys' fees were ever awarded it would not be as high as the one third contingency fee the steelworkers agreed to. *Id.* Young also said, ". . . if the judge ever awarded fees, those would then be thrown into any pot and you'd get two thirds of them, I'd get a third of them. That's our

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[3] Young said, "I represent you all. I'm not going to give anybody nothing that's stuck through this case for thick and thin the whole time. And so I'm the guy that put 12 thousand bucks in there for each of you. Because you lost, but you stuck with us." Trans. at 39:13-17.

contract." Trans. at 49:3-6.

At that meeting, Defendants represented that as of June 28, 1995, the costs, meaning the money plaintiffs had paid the Defendants for the litigation to date, totaled $1,354,700. Trans. at 40:7-8. Those costs would be returned and deducted from the total settlement before Defendants calculated their attorneys' fees.

Those present at the meeting voted "yes" on the ballots. Counsel individually contacted the remaining steelworkers. Initially, two steelworkers held out and did not vote until later. The settlement proceeded with USX despite the fact that two steelworkers had not voted. Eventually, all 1,677 steelworkers voted "yes." The ballots informed the steelworkers that if they voted no, their counsel might withdraw and they may have to obtain new counsel. (Young Affid. Ex. J). The ballots described the general terms of the settlement and also said, "It is my understanding that this ballot is not a ballot to accept or reject USX's offer, but in fact is a ballot to empower my attorneys to attempt to achieve a payment from USX for all sums due to me under Judge Jenkins' decision on the terms set forth herein." *Id.*

A letter was sent to all steelworkers July 20, 1995 informing them that the settlement was proceeding and payments would start in 40 days. It also provided a schedule when the steelworkers were to come to the office to read and review the settlement agreement, confirm the sums each person was to receive, receive an explanation of the hearing process, and sign a written release so payments could begin. (Young Affid. Ex. K). All 1,677 steelworkers signed the Ballot and the Release, and each received a copy of the settlement agreement. (Young Affid. ¶19). Yet another letter was sent on August 29, 1995 informing the steelworkers that payments

were to begin, September 5, 1995. (Young Affid. Ex. N). The letter informed the steelworkers that attorneys' fees of 33 1/3% would be deducted from the gross amount and that a check reimbursing the steelworkers for costs would be included. *Id.* The final payment was made in March 1996. Each steelworker received an accounting entitled "Final Gross Payout by Group." All but a few steelworkers executed a settlement summary similar to that of Bill Wright's in Exhibit P.

Approximately 428 steelworkers participated in the hearing process before Scott Daniels and 366 received additional awards. (Young Affid. Ex. H). Those that participated in the hearing process represented themselves. Scott Daniels said, "Most of the awards involve only an arithmetic computation. These are stated without comment. Where explanation is required, it is provided." (Young Affid. Ex. G. ¶11). Scott Daniels awarded some steelworkers extra money based on exceptional circumstances. *Id.* at ¶10. For the most part, he awarded the money according to the limitations set forth in Judge Jenkins' decision and "attempted to approve claims based on the merits of each, without regard to the total amount available." *Id.* at ¶¶ 1, 2. He also acknowledged "there is only so much pie to slice up." *Id.* at ¶ 8. He further said, "The settlement from USX provided only a limited amount of money. An award to any one plaintiff, no matter how deserving, takes from the award of another plaintiff. It would not be fair or just to approve an award which was not within Judge Jenkins' Ruling, taking money from another co-worker whose damages were within Judge Jenkins' Ruling." *Id.*

STANDARD OF REVIEW

Summary judgment is appropriate if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Utah R. Civ. P. Rule 56(c). Summary judgment is proper when the pleadings and other documents before the court establish that there is no basis for awarding the relief sought by a litigant. *Tanner v. Utah Poultry & Farmers Cooperative*, 359 P.2d 18, 19 (1961). The Court will review the facts in the light most favorable to the non-moving party. *Richards v. Anderson*, 337 P.2d 59, 60 (1959). "Nevertheless, when the best showing a plaintiff could make would not entitle him to recover under the law, summary judgment is appropriate and serves its intended purpose of avoiding fruitless court proceedings with their attendant costs in time and money." *Larsen v. Wycoff Co.*, 624 P.2d 1151, 1153 (Utah 1981).

"To successfully defend against a motion for summary judgment, the nonmoving party must set forth facts "'sufficient to establish the existence of an element essential to that party's case.'" *Burns v. Cannondale Bicycle Co.,* 876 P.2d 415, 419 (Utah Ct. App. 1994) (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)). Failure to do so with regard to any of the essential elements of that party's claim will result in a conclusion that the moving party 'is entitled to a judgment as a matter of law.' *Id.* at 420; see also *Celotex,* 477 U.S. at 322-23 ("In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." (quoting Fed. R. Civ. P. 56(c)))." *Anderson Dev. Co. v. Tobias*, 2005 UT 36 ¶23. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

249-250 (1986). In other words, unsupported opinions and conclusions will not defeat summary judgment. *Robertson v. Utah Fuel Company*, 889 P.2d 1382, 1388 n. 4 (Utah App. 1995); *Norton v. Blackham*, 669 P.2d 857 (Utah 1983). A party is required to come forward with admissible evidence to support their claims. *Preston v. Lamb*, 436 P.2d 1021, 1022 (Utah 1968).

FRAUDULENT MISREPRESENTATION

The First Cause of Action alleged by the Plaintiffs in the Third Amended Complaint is "Fraudulent Misrepresentation." The Plaintiffs claim the Defendants misrepresented that the "Plaintiffs would receive in the proposed settlement everything Judge Jenkins awarded to the 'bellwether' plaintiffs in the USX case, and more" because the settlement did not include any amount for vacation pay to be paid in 1988 and "other elements and components of the compensation awarded by Judge Jenkins to the 'bellwether' USX plaintiffs." (Third Am. Compl. ¶¶ 38 and 39).

Defendants move for summary judgment on this issue for two reasons. First, the claim was not pled with particularity as required by Rule 9(b) of the Utah Rules of Civil Procedure, particularly in light of the fact that this Court already ruled that Judge Jenkins did not award vacation pay for 1988 and the claims based upon this alleged misrepresentation have been dismissed. Second, there is no evidence, and Plaintiffs have provided none, to support the statement that "other elements and components" awarded by Judge Jenkins were not included. At trial, Plaintiffs would be required to prove each element of their fraud claim by clear and convincing evidence and must, therefore, meet that same standard in opposing summary judgment by coming forward with evidence from which a reasonable jury could find the

Defendants fraudulently misrepresented the settlement by clear and convincing evidence.

Rule 9(b) requires the circumstances constituting fraud to be pled with particularity in all averments. Utah R. Civ. P. Rule 9(b). A party alleging a claim based on fraud cannot avoid summary judgment by "mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts." *Franco v. The Church of Jesus Christ of Latter-Day Saints, et al.*, 2001 UT 25 ¶36. "To state a claim for fraud, a plaintiff must plead not only that the defendant made a material representation that was false, but also that the defendant either knew the representation to be false or made the representation recklessly, knowing that he or she had insufficient knowledge upon which to base such a representation." *Id.*

In this case, the Plaintiffs have failed to meet the standard of pleading fraud with particularity. Pleading with particularity requires more than a general statement; it requires detail. Plaintiffs contend they have met that standard by describing the time, place, speaker, and statement surrounding the false representation. However, Plaintiffs have failed to say why the statement was false or how the Defendants either knew it was false or recklessly made a misrepresentation knowing they had insufficient knowledge. Instead, all they have said is that Defendants "misrepresented the nature and amount of the settlement recovery . . ." The Court finds the statement to be too general. Plaintiffs do not give any details on what exactly they should have received in the settlement according to Judge Jenkins' decision, but did not. In addition, Plaintiffs certainly have not said how the Defendants knew the statements were false or recklessly made the statements on insufficient knowledge.

"To establish fraud under Utah law, a party must prove by clear and convincing evidence

each of the following elements: (1) That a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage." *Franco v. The Church of Jesus Christ of Latter-Day Saints, et al.*, 2001 UT 25 ¶¶33 (quoting *Mikkelson v. Quail Valley Realty*, 641 P.2d 124, 126 (Utah 1982)).

Plaintiffs have not come forward with any, let alone clear and convincing, evidence to support their claim of fraudulent misrepresentation; and, therefore, it must be dismissed. Plaintiffs admit they have had their own expert forensic accountant review Judge Jenkins' decision and the settlement, and yet, they do not provide an affidavit or any statement by the accountant that a certain damage awarded by Judge Jenkins was not included in the settlement or was not properly accounted for. (Opp. Memo at 66). Judge Jenkins' decision was over 100 pages in length. Defendants spent hours perusing the decision themselves to interpret its meaning and determine exactly what Judge Jenkins' awarded the bellwether steelworkers. (Trans. at 13-14). Defendants explained exactly how they calculated the damages for the various categories of steelworkers at the settlement meeting and gave the steelworkers a worksheet showing those calculations. Plaintiffs have not provided any admissible evidence to contradict the affidavits and exhibits Defendants provided. Plaintiffs have failed to show how the Defendants knew the statement was false. Furthermore, Plaintiffs have failed to provide any admissible evidence

showing that the Defendants acted recklessly in making statements they knew were based on insufficient evidence.

Plaintiffs claim, in essence, that they cannot develop every way in which these statements were false until discovery takes place. Time to conduct discovery has expired. Furthermore, the Court invited the Plaintiffs to file motions to compel if the Defendants failed to respond to Plaintiffs discovery requests. No such motions have been filed. Moreover, much of the information Plaintiffs claim they need is within their own possession. Plaintiffs could review Judge Jenkins' decision, determine what damages should be included, and make their own calculations as to what the awards should be. Plaintiffs know what he or she received in the settlement and could compare that to the amount they claim they should have received. In Plaintiffs' Opposing Memo, they bring up several issues on how the statements of Defendants during the settlement meeting were false. Specifically, Plaintiffs claim they were told that the money to pay the non-prevailing steelworkers would come out of the Defendants attorneys' fees, that they were not told that a "No" vote would not destroy the settlement, i.e. that the settlement would proceed with less than 100% "Yes" votes, and that Defendants had sole control of the "extra monies," the sum of $3.714 million ($2.3 million after costs) obtained in the settlement above Defendants' calculations of actual damages, which actually belonged to the prevailing steelworkers. None of these issues were included in the pleadings for fraudulent misrepresentation to meet the specificity requirement. There is also direct evidence, some of which submitted by Plaintiffs themselves, showing their own claims to be false. For example, Plaintiffs provided the letter from Lynn Harris dated July 20, 1995 stating the Defendants were

able to convince USX to take less than 100% "Yes" votes. Defendants provided multiple worksheets showing how the settlement was calculated. These worksheets clearly show the $12,000 to be paid non-prevailing steelworkers was a part of the settlement. Finally, there is no statement by the Defendants that they had sole discretion over the "extra monies" anywhere in the record.

Finally, the only other allegation of damage in the First Cause of Action, and one that comes up in other causes of actions, is that the Plaintiffs "paid an excessive attorneys' fees to Defendants over and above the amount of fee that Plaintiffs, and other USX plaintiffs, would have been required to pay had the case been adjudicated under ERISA." (Third Am. Compl. ¶¶44). In other words, Plaintiffs assume that had every remaining steelworker litigated their claims Judge Jenkins would likely have awarded attorneys' fees in an amount substantially less than the value of the contingency fee and limited recovery of attorneys' fees to that amount.

In *Joos v. Intermountain Healthcare, Inc.*, 25 F.3d 915, 917-918 (10th Cir. 1994), the Tenth Circuit expressly held that a court award of attorneys' fees in an ERISA case is not intended to place a cap on the attorneys' fees that a plaintiff's attorney can collect for their efforts and does not affect the contractual relationship between a plaintiff and his or her attorneys for a contingent fee. *See also Drennan v. General Motors Corp.*, 977 F.2d 246, 253 (6th Cir. 1992) *cert. denied*, 113 S. Ct. 2416 (1993); *Venegas v. Mitchell*, 495 U.S. 82, 87 (1990). Therefore, as a matter of law, an award of attorneys' fees does not require the court to interfere with the contingency fee agreement privately arrived at between attorney and client. Judge Jenkins' did not award attorneys' fees in the bellwether cases and it is mere speculation that he ever would

award attorneys' fees. Even if Judge Jenkins had awarded attorneys' fees, that award would not invalidate the fee agreement between Defendant Attorneys and Plaintiff clients. The Court concludes that Defendants were not under any obligation to give up their right to collect attorneys' fees based on the fee agreement and such collection was not fraudulent or in breach of any duty owed to the client.

LEGAL MALPRACTICE–BREACH OF CONTRACT

The Second Cause of Action alleged by Plaintiffs is "Legal Malpractice–Breach of Contract." Plaintiffs claim Defendants breached their contract because Defendants did not get the Plaintiffs all that they would have been awarded under the Judge Jenkins' decision, Defendants did not represent Plaintiffs competently and honestly, Defendants did not avoid conflicts of interest, Defendants did not represent Plaintiffs with undivided loyalty, and Defendants made false and misleading statements and did not disclose all material information.

Defendants move for summary judgment on this issue because the only specific breach of contract alleged by the Plaintiffs is that they did not receive all that they were entitled to under Judge Jenkins' decision and Defendants have demonstrated that there is no evidence supporting Plaintiffs claims.

As stated above, the Plaintiffs have failed to produce evidence to rebut summary judgment of the issue that they did not receive all that they would have under Judge Jenkins' decision.

Plaintiffs claim Defendants failed to disclose material information by not disclosing the true and actual consequence of a "No" vote, i.e. that USX specifically contemplated the potential

of dissenting votes and established a means to hold aside a small portion of the settlement proceeds from immediate distribution, while concluding the settlement generally. At the settlement meeting, Defendants discussed at length that each person has the right and power to vote "No" and stop the settlement for the entire group. Spence said, "So you have the power, but you have the responsibility. . . . Now is it possible that we could have 1,699 [out of about 1,700 steelworkers] vote yes and one vote no and that USX would go along with that? That's possible. Is it possible if two vote no that USX will still go? That's possible. But if one votes no and they don't want to go, they don't have to . . ." In addition, Defendants provided two written documents showing USX agreed to modify the settlement agreement and accept less than 100% "Yes" votes. One document is the letter written by Lynn Harris and dated July 20, 1995. The other is a letter written by Michael L. Larsen, USX's counsel, dated July 18, 1995. (Young Supp. Affid. Ex. 2).

Plaintiffs claim Defendants failed to avoid conflicts of interest. Defendants may represent multiple clients where their interests may be adequately represented and the clients are aware of the multiple representations. Ut. Rule of Prof. Con. 1.7. In the underlying class action law suit, the Plaintiffs were aware that the Defendants represented multiple classes of people. The Plaintiffs have a burden to show that their interests were not adequately represented, i.e., what conflicts the Defendants had in representing the class and how they breached such representation. In the two sentences relating to this claim, the Plaintiffs fail to show what conflicts the Defendants failed to avoid and that any such conflicts were not waived by the Plaintiffs.

Plaintiffs also argue that the Defendants breached their duty of undivided loyalty. Plaintiffs were unable to even provide the legal standard applicable for this claim. Without the framework for this issue, the Plaintiffs wholly failed to show a genuine issue of material fact to defeat summary judgment.

LEGAL MALPRACTICE-BREACH OF FIDUCIARY DUTY

The Third Cause of Action Plaintiffs' allege is for "Legal Malpractice-Breach of Fiduciary Duty." Plaintiffs claim Defendants breached their duty to represent the Plaintiffs with "undivided loyalty, to preserve the Plaintiffs' confidences, to manage the Plaintiffs' funds and the proceeds of any settlement in a manner that protected the best interests of Plaintiffs, to act in Plaintiffs' best interest, and to disclose any material matters bearing upon their representation of the Plaintiffs." (Third Am. Compl. ¶56).

Plaintiffs claim the Defendants failed to manage Plaintiffs' funds in a manner that protected their best interests. Specifically, Plaintiffs claim Defendants have mismanaged money Plaintiffs paid Defendants for costs of the litigation. At the settlement meeting, Defendants told the Plaintiffs that the total amount of money the steelworkers had paid for the cost of the litigation was $1,354,700. Defendants never represented that this amount reflected the total amount of costs for the litigation to date. To the contrary, on both the "Total Gross Payout by Group" given to Plaintiffs at the settlement meeting and the "Final Gross Payout by Group" given to Plaintiffs in March of 1996 it shows the total costs to be a little over $1.8 million. Plaintiffs have not provided any evidence to support their claim that costs were mishandled. Therefore, summary judgment on this issue is granted.

Plaintiffs claim Defendants failed to represent certain clients with undivided loyalty. Plaintiffs claim Defendants breached their duty of undivided loyalty because they had control and sole discretion over the "extra monies" and that non-prevailing plaintiffs participated in the hearing process and took any money awarded them took away from the money awarded prevailing steelworkers. Plaintiffs have not provided any evidence to support these claims. The Court grants summary judgment on this issue.

Finally, Plaintiffs claim Defendants created, implemented and influenced an appeal process that distributed proceeds in an unequal, unfair and self-serving manner. The Court finds Plaintiffs have not provided any evidence to support the claim that Defendants improperly influenced the hearing process. The record shows Judge Daniels was an independent party. However, the Court finds that Plaintiffs have provided evidence to create a genuine issue of material fact and defeat summary judgment motion on the issue of whether Defendants breached their fiduciary duty in how they created and implemented the hearing process.

LEGAL MALPRACTICE–NEGLIGENCE

The Fourth Cause of Action Plaintiffs' allege is for "Legal Malpractice–Negligence." Plaintiffs claim Defendants negligently failed to take the steps necessary to insure that Plaintiffs received a fair and complete compensation in the USX lawsuit, including all amounts awarded by Judge Jenkins for back pay, vacation pay, sick pay, incentive pay, sub payments, other employee compensation, and attorneys' fees.

Defendants move for summary judgment on this claim because there is no evidence to support Plaintiffs' claims that they did not receive in the settlement everything Judge Jenkins'

awarded, any claim for attorneys' fees is speculation and inappropriate as a matter of law, and the statute of limitations expired in 1999, two years before the original lawsuit was filed in July 2001.

Plaintiffs, in their Opposing Memorandum, allege three basis for their negligence claim. First, Plaintiffs claim Defendants were negligent because they failed to ensure Plaintiffs received fair and complete compensation. Plaintiffs claim the Defendants were negligent in their handling of the hearing process for the following reasons: (1) the Defendants did not adequately explain the hearing process or disclose that, statistically speaking based on the use of averages to calculate damages, roughly 838 of the steelworkers had legitimate claims; (2) the money for the hearing process was exhausted by only 428 claimants and many of those claimants were undeserving, but were preferentially treated; (3) the Defendants did not adequately communicate the parameters of proof to sustain a claim in the hearing process; and (4) the Defendants did not represent their clients in the hearing process and it was unreasonable to assume that the worksheet Defendants provided was enough to help steelworkers in the appeal process. Defendants were also negligent because damages should never have been calculated based on averages. Defendants were negligent because they have not provided any evidence to explain how the $2.3 million was calculated or how it was supposed to be enough money to satisfy all the claims. Second, Plaintiffs claim Defendants negligently undervalued attorneys' fees and should have gotten more out of USX. Finally, Plaintiffs claim Defendants representation extended to some of the Plaintiffs' dealings with BM&T and failed to advise these Plaintiffs regarding important waiver of rights.

Taking the claims in reverse order, the Court will first address the BM&T claims. Any claims that Defendants represented some of the Plaintiffs, whoever they may be, in their dealings with BM&T were not alleged in the Third Amended Complaint. Furthermore, Plaintiffs have failed to come forward with admissible evidence that any of the Defendants agreed to represent any of the Plaintiffs in connection with their employment by BM&T, or that any of the Plaintiffs sought advice from any of the Defendants regarding their employment with BM&T.[4]

The Court has already addressed the issue of attorneys' fees in the "Fraudulent Misrepresentation" section. Any claim based on Defendants' failure to obtain more attorneys' fees or for taking too much in attorneys' fees is dismissed. Plaintiffs claimed in their Opposing Memoradum that Defendants negligently undervalued attorneys' fees and should have obtained more from USX. This argument ignores the fact that Judge Jenkins did not award attorneys' fees and, therefore, Counsel had no ability to dictate the amount of attorneys' fees paid by USX. Furthermore, the argument is mere speculation with no evidence or case law to support it. Moreover, as stated above the parties had a fee agreement that dictated the amount of attorneys' fees.

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[4] Plaintiffs have provided on affidavit, that of Ron Chilton's, saying, "I know [Allen Young] was watching what was happening with his client who went to work for BM&T because he sent me a warning letter about anyone who was going to resign, and he never explained why or for what the resignation would be for. And he didn't say anything about the BM&T forcing us to give up our severance in exchange for employment." (Chilton Affid. ¶3). Plaintiffs also provided a letter from Allen Young dated October 8, 1987 sent to Plaintiffs warning them that an agreement between USX and United Steelworkers contains resignation language that could be confusing and Young tried to clarify it. (Chilton Affid. Ex. C). This evidence does not create a disputed issue of material fact that any of the Defendants agreed to represent some Plaintiffs in their relations with BM&T, nor does it show that any of the Defendants assumed that duty.

Finally, the Court will address the claims that Defendants did not ensure that Plaintiffs received a fair and complete compensation. As stated above, the Plaintiffs failed to show how their settlement amount was not fair and complete. Furthermore, the Plaintiffs failed to show the Defendants had a duty to do more than inform them of the hearing process or how the settlement was calculated. Without law to show the Defendants had a higher duty this Court will not impose such a duty on the Defendants. The Plaintiffs failed to provide adequate support in law or fact for their negligence claim. The Court grants summary judgment to Defendants on this cause of action.

ACCOUNTING

The Fifth Cause of Action in the Third Amended Complaint is for an "Accounting." Plaintiffs claim Defendants had a duty to handle the money received from plaintiffs and from USX for such plaintiffs' benefit in a manner consistent with their duty as the plaintiffs' attorneys and to hold and distribute the money rightfully and in the best interest of the plaintiffs. Plaintiffs claim Defendants had a duty to properly and completely account for all moneys received by Defendants and held on Plaintiffs' behalf in a timely manner.

An attorney has an obligation to provide a full accounting to the client upon request by the client. Ut. Rule Pro. Con. 1.15. Where a party has a right to an accounting that party must file a suit for an accounting within four years to come within the statute of limitations. *Cheves v. Williams*, 1999 UT 89 ¶21 (to satisfy the statute of limitations a plaintiff partner must file a suit for an accounting within four years of the dissolution of the partnership). Defendants gave Plaintiffs a full accounting by March 1996. When Plaintiffs picked up their last check and signed

the release form, they received the "Final Gross Payout by Group" sheet showing what each category of steelworker received. Also, Plaintiffs individually received a settlement summary showing exactly what that individual received and what was deducted. All the affidavits submitted by Plaintiffs say each affiant was dissatisfied with the accounting at the time they received it back in 1996. The affidavits do not say that the Plaintiffs did not receive an accounting. Plaintiffs claim in their Opposing Memorandum that the issues regarding the accounting were so subtle they could only be ascertained by an expert forensic accountant. However, Plaintiffs do not support this contention with any admissible evidence including an affidavit of or report by the expert forensic accountant.

Plaintiffs claim the discovery rule applies to toll the running of the statute of limitations because Defendants' concealment or misleading conduct stopped plaintiff from becoming aware of the cause of action and exceptional circumstances exist which make application of the general rule irrational or unjust. Plaintiffs claim Defendants misled Plaintiffs misrepresenting and failing to disclose the true nature of the circumstances of the settlement agreement and their handling and distribution of settlement proceeds. Plaintiffs claim they relied on these deceptions by believing that "(i) the settlement proceeds constituted all that Judge Jenkins had awarded and more, (ii) each Plaintiff was receiving a full compensation for the compensable damages he or she suffered, (iii) Defendants were paying any amounts given to non-prevailing steelworkers from their own pockets, (iv) the distributions from the "surplus funds" were made on a mathematical formula over which they had no control, and (v) every dollar of the settlement proceeds was actually distributed in a fair and proper manner." Plaintiffs have failed to provide evidence to create a genuine issue of material fact on any of these issues. Furthermore, the

Plaintiffs failed to show the Defendants concealed or misled the Plaintiffs because an accounting was provided through the "Final Gross Payout by Group" and the "Settlement Summary" for each individual. If the Plaintiffs wanted more, which they state in their affidavits, then they should have requested additional accounting information. Finally, there is nothing in this case to show exceptional circumstances exist to warrant tolling of the statute of limitations.

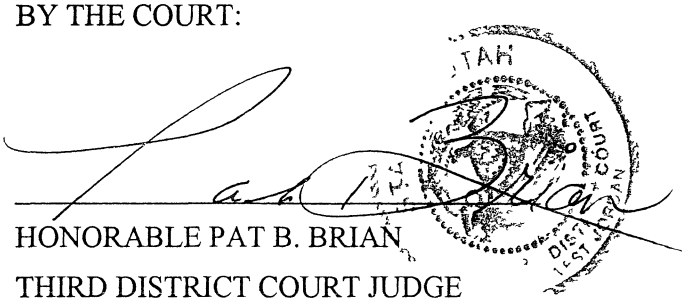
BREACH OF TRUST–BREACH OF FIDUCIARY DUTY

Defendants moved for summary judgment on this claim. Plaintiffs did not oppose it summary judgment in their Opposing Memorandum. Therefore, the claim has been waived and summary judgment is GRANTED.

The Court DENIES in part and GRANTS in part summary judgment. The Court grants summary judgment on most of the claims. The only claim to survive summary judgment is the limited issue of whether Defendants breached their fiduciary duty in how they created and implemented the hearing process.

DATED this 12 day of January, 2006.

BY THE COURT:



HONORABLE PAT B. BRIAN
THIRD DISTRICT COURT JUDGE

Appendix C

THIRD DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH
WEST JORDAN DEPARTMENT

RONALD J. CHILTON; TOM LOWE; MERDENE LOWE; DWIGHT G. EVANS; A DWAYNE RAWLINGS; ALEX COOKSEY; ALLEN S. WEBB; *et al.*,

Plaintiffs,

vs.

ALLEN K. YOUNG; YOUNG KESTER & PETRO; GERRY L. SPENCE; LYNN C. HARRIS; SPENCE, MORIARITY & SCHUSTER; JONAH ORLOFSKY; PLOTKIN & JACOBS; and JOHN DOES I-V, individuals whose true identity is unknown to plaintiffs,

Defendants.

MEMORANDUM DECISION
(Motions to Strike Plaintiffs' Motions for Reconsideration)

Case No. 030105887
Judge Stephen L. Roth

This matter came on for hearing on February 9, 2007, on Defendants' Joint Motion to Strike Motion of Certain Plaintiffs" for Reconsideration, Defendants' Joint Motion to Strike Motion of Ronald J. Chilton to Reconsider, and Defendants' Joint Motion to Strike the Motion for Reconsideration of David L. Glazier. The defendants were represented by Richard D. Burbidge, Burbidge & Mitchell; Julie Edwards, Howrey, L.L.P.; and Michael F. Skolnick, Kipp & Christian. The majority of the plaintiffs (sometimes referred to as the "HJS Plaintiffs" by the parties and as the "HJS plaintiffs," or simply "plaintiffs," by the court) were represented by Evan A. Schmutz, Hill, Johnson & Schmutz, L.C.; and plaintiffs Ronald J. Chilton and David L. Glazier represented themselves. The court having considered the arguments of counsel and *pro se* parties and the written submissions in support of and in opposition to the defendants' motions to strike, along with pertinent

pleadings on file in this matter, grants the motions to strike, and the court declines to consider the plaintiffs' motions for reconsideration, for reasons explained in this memorandum decision.

PROCEDURAL BACKGROUND

Plaintiffs have filed this suit against their former attorneys, alleging legal malpractice and fraudulent misrepresentation in connection with litigation against plaintiffs' former employer. The plaintiffs here are all former employees of the Geneva steel plant in Orem, Utah, owned at the time by United States Steel Corporation ("USX") and sold to Basic Minerals and Technologies, Inc., on August 31, 1987. The defendants were co-counsel for between 1677 and 1892 steelworkers who sued USX to recover benefits they claimed to be entitled to prior to the sale of the plant. Bifurcated trials took place in federal court in 1991 and 1993, addressing, respectively, liability and damages, with Judge Bruce Jenkins making written rulings in each case. The damages trial addressed the damages claims of 24 bellwether plaintiffs in anticipation of a third trial that would establish damages payable to individual plaintiffs. Judge Jenkins issued a lengthy decision after the second trial addressing, among other things, the categories of employees entitled to damages and the kind and scope of damages available. *Pickering v. USX Corporation,* 1995 WL 584372 (D.Utah May 8, 1995) ("*Pickering*"). After this decision, counsel for the steelworker plaintiffs in *Pickering* reached a settlement with USX for about $47,000,000, which the plaintiffs accepted. A more detailed summary of the process is set out in the Memorandum Decision (Defendants Motion for Summary Judgment), dated September 22, 2005 (the "First Memorandum Decision"), at 1-5, and in the Memorandum Decision (Defendants Second Joint Motion for Summary Judgment), dated January 12, 2006 (the "Second Memorandum Decision"), at 1-4.

In 2002, plaintiffs filed the present lawsuit, in which about thirteen percent of the plaintiff steelworkers in *Pickering* sued defendant Young, one of their attorneys in that case. At the time of the first summary judgment proceeding, the subject of the motions for reconsideration now before

the court, a minority of the plaintiffs were represented by Haskins & Associates (the "Haskins plaintiffs") and the majority by their present counsel, Hill, Johnson & Schmutz (the "HJS plaintiffs"). The Haskins plaintiffs' complaint alleged four claims for relief: (1) fraudulent misrepresentation, (2) legal malpractice-breach of contract, (3) legal malpractice-breach of fiduciary duty, and (4) legal malpractice -negligence against defendant Young only. The HJS plaintiffs had filed a third amended complaint adding the additional defendants, who also represented plaintiffs in *Pickering*, and two additional claims for relief: (5) accounting, and (6) breach of trust/breach of fiduciary duty.

1. **Defendants' Motions for Summary Judgment and the Court's Prior Decisions**.

On April 6, 2005, the defendants filed a motion for summary judgment (the "first summary judgment motion"). Defendants asserted that the plaintiffs' claims for relief, in essence, alleged that their attorneys in *Pickering* had represented to them that the USX settlement amount included all relief they would have obtained at trial, but that the settlement amount, in fact, failed to include two categories of damages to which they would have been entitled, 1987 vacation pay and an award of ERISA attorney fees. Defendants sought a summary judgment ruling that plaintiffs would not have been entitled to 1987 vacation pay under the USX labor agreement nor ERISA attorney fees in the *Pickering* lawsuit and that therefore there could not have been a misrepresentation about those things. After briefing by both sides and the filing of related motions, the first summary judgment motion was argued to the court on August 12, 2005. Judge Pat B. Brian issued the First Memorandum Decision on September 22, 2005, granting summary judgment in defendants' favor on the vacation pay issue ("the Court concludes the plaintiffs were not entitled to receive vacation pay that accrued in 1987, and was payable in 1988"), but denying summary judgment on the attorney fees issue. First Memorandum Decision at 13.

On October 13, 2005, the defendants filed the Second Joint Motion of Defendants for Summary Judgment on All Remaining Claims of Plaintiffs (the "second summary judgment motion"). On December 5, 2005 the Haskins plaintiffs stipulated to dismissal of their claims, with prejudice, pursuant to Ut.R.Civ.P. Rule 41(a). After briefing by the parties, oral argument on the second motion for summary judgment took place on January 4, 2006. Judge Brian's Second Memorandum Decision, dated January 12, 2006, was issued on January 13, 2006, granting summary judgment in favor of defendants on all remaining claims in the Third Amended Complaint except for the "issue of whether Defendants breached their fiduciary duty in how they created and implemented the hearing process."

Judge Brian retired and the case was assigned to the present judge on January 12, 2006.

2. **Plaintiffs' Motions for Reconsideration and Defendants' Motions to Strike**

On August 2, 2006, about ten months after the First Memorandum Decision and six months after the Second Memorandum Decision, plaintiff Ronald J. Chilton, formerly represented by HJS, but now *pro se*, filed an unsigned Plaintiffs Request for Arguments on the Enclosed Documents, attached to which was an unsigned, 58-page long document entitled Plaintiffs' Memorandum in Support of Motion to Reconsider the Court's Decision to Grant Defendants' First Motion for Summary Judgment and Partially Grant Defendants' Second Motion for Summary Judgment (the "Chilton Reconsideration Memorandum"), with several additional attachments. Two weeks later, on August 16, 2006, plaintiff David L. Glazier, also formerly represented by HJS, but now *pro se*, filed an unsigned Plaintiffs Request for Arguments on the Enclosed Documents, identical in substance to plaintiff Chilton's, attached to which was the a copy of the Chilton Reconsideration Memorandum and attachments. Although neither Mr. Chilton nor Mr. Glazier appears to have submitted a distinct motion and none of the documents appear to be signed, the court is treating their

respective submissions as identical motions for reconsideration (the "Chilton and Glazier Reconsideration Motions").

On August 21, 2006, defendants filed Defendants' Joint Motion to Strike Motion of Ronald J. Chilton to Reconsider the Court's Decision to Grant Defendants' First Motion for Summary Judgment and Partially Grant Defendants' Second Motion for Summary Judgment ("Motion to Strike the Chilton Reconsideration Motion"), accompanied by Defendant's Joint Memorandum in Support of the Motion to Strike the Chilton Reconsideration Motion. On August 30, 2006, defendants filed Defendants' Joint Motion to Strike the Motion for Reconsideration of David L. Glazier ("Motion to Strike the Glazier Reconsideration Motion"), accompanied by Defendants' Joint Memorandum in Support of Motion To Strike the Glazier Reconsideration Motion.

On August 22, 2006, defendants filed a further summary judgment motion, entitled Joint Motion of Defendants for Summary Judgment on Plaintiffs' Remaining Breach of Fiduciary Duty Claim and a supporting memorandum and affidavit. This motion seeks summary judgment on the last claim remaining to plaintiffs after the First and Second Memorandum Decisions. (Further briefing on this motion has been in abeyance pending resolution of the various motions for reconsideration and motions to strike addressed in this decision.)

On September 18, 2006, the HJS plaintiffs filed their Motion for Reconsideration of the Court's First Entry of Summary Judgment (Vacation Pay Issue) (the "HJS Plaintiffs' Motion for Reconsideration"), accompanied by their Memorandum in Support of Certain Plaintiffs' Motion for Reconsideration of the Court's First Entry of Summary Judgment (Vacation Pay Issue) and Opposition to a Portion of Defendants' Joint Motions to Strike the Motions for Reconsideration of Ronald J. Chilton and David L. Glazier ("HJS Plaintiffs' Motion for Reconsideration Memorandum"). The HJS Plaintiffs' Motion for Reconsideration Memorandum attached, as Exhibit A, a full copy of the 272-page Agreement between USS, Division of USX Corporation and the

United Steelworkers of America, Production and Maintenance Employees, Dated February 1, 1987 (referred to by the parties and the court as the Basic Labor Agreement or "BLA"), which is the contract at the heart of the vacation pay issue.

In response, the defendants filed Defendants' Joint Motion to Strike the HJS Plaintiffs' Motion for Reconsideration and that portion of the HJS Plaintiffs' Motion for Reconsideration Memorandum which was styled as in "Opposition to a Portion of Defendants' Joint Motions to Strike the Motions for Reconsideration of Ronald J. Chilton and David L. Glazier"[1] (the "Motion to Strike the HJS Plaintiffs' Motion for Reconsideration"). In response, HJS plaintiffs filed HJS Plaintiffs' Memorandum in Opposition to Defendants' Joint Motion to Strike (the "HJS Plaintiffs" Opposition to Motion to Strike"), to which defendants filed a joint reply.

The court has considered all the filings described above, as well as other pertinent filings submitted by the parties in connection with the issues decided here, even though the court does not specifically identify them here.

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[1] The motion to strike this portion of the memorandum was based on defendants' claim that the HJS plaintiffs lacked standing to be heard on the Chilton and Glazier Reconsideration Motions. Because it appears that the HJS plaintiffs limited their support of Chilton and Glazier to the vacation pay issue, in which they had a clear common interest, the court concludes that they did have standing and therefore DENIES this portion of defendants' Motion to Strike the HJS Plaintiffs' Motion for Reconsideration. This footnote constitutes the order of the court on this issue.

DISCUSSION

The defendants have moved to strike[2] each of the three motions for reconsideration filed by the various plaintiffs, claiming that it is inappropriate to reconsider the court's prior rulings under the circumstances here. The court will first discuss the law applicable to motions for reconsideration and will then separately address the HJS Plaintiffs' Motion for Reconsideration and Chilton and Glazier Motions for Reconsideration.

A. APPLICABLE LAW

Utah appellate courts have uniformly concluded that "[m]otions to reconsider are not recognized by the Utah Rules of Civil Procedure." *Tschaggeny v. Milbank Insurance Co*, 2007 UT 37, ¶ 15; *see, e.g., Salt Lake City Corp. v. James Constructors, Inc.*, 761 P.2d 42, 44 (Ut.Ct.App. 1988) ("[A] motion to reconsider is not expressly available under the Utah Rules of Civil Procedure . . . ."). Nevertheless, the courts have recognized that reconsideration of prior rulings may be appropriate in certain circumstances at the court's discretion. Under Utah case law, such motions for reconsideration appear to fall into three categories, each of which involve different considerations for the exercise of a trial court's discretion as to whether to reconsider an earlier ruling.

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[2] The HJS plaintiffs have objected to the defendants' use of a "motion to strike" in pursuit of their goals in this proceeding, because "[t]he rules of civil procedure do not recognize or permit a motion to strike another motion," a motion to strike being limited to the context of Rule 12(f). HJS Plaintiffs" Opposition to Motion to Strike at 2, n.3. The court agrees with plaintiffs with regard to the "motion to strike" terminology, which appears to be limited to removing from the record statements or documents that simply should not be there. As discussed below, the court has considered the content of the plaintiffs' motions to reconsider and their supporting memoranda in connection with the motions to strike and believes that to "strike" them would suggest that they are not part of the pertinent record in this matter. The court is therefore treating the defendants' motions to strike as, perhaps more appropriately, "objections" to the plaintiffs' motions for reconsideration. Nevertheless, the "motion to strike" terminology will be used in this decision to describe the defendants' various motions in order to avoid confusion.

The first category is where a motion to reconsider is filed after a court's ruling but before that ruling has been reduced to a written order or judgment, i.e, where a ruling has been made but not finalized. In such a circumstance discretion is virtually unconstrained, the court having "every right to fully reassess the matter . . . ." *Ron Shepherd Insurance v. Shields*, 882 P.2d 650, 653-54 (Utah 1992) (because the court had not yet signed a written summary judgment after its unsigned minute entry in defendants' favor, "the plaintiffs' motion for reconsideration was, in essence, not a motion for reconsideration at all, but simply a reargument of the their opposition to defendant's motion for summary judgment, which a trial court is free to entertain at any point prior to entry of a final order or judgment."); *see Bennion v. Hansen*, 699 P.2d 757, 760 (Utah 1985) ("Until a court files its findings of fact, no decision has been rendered or final ruling made" and "[a]ny judge is free to change his or her mind on the outcome of a case until a decision is formally rendered.").

A second category lies at the other end of the finality spectrum, where a written order or judgment has been issued entirely disposing of a case, i.e., finally adjudicating all claims as against all parties. In the past, post-judgment reconsideration motions, while discouraged in form,[3] have been considered if they could be identified in substance as motions for a new trial or to amend judgment, authorized by Rule 59. *See Gillett v. Price*, 2006 UT 24, ¶¶ 7-8 (noting that the substantive nature of a motion for reconsideration has generally been addressed by appellate courts in determining whether a motion for reconsideration tolls the time for appeal if it is substantively a Rule 59 motion). Such motions to reconsider, however, are now virtually prohibited:

> The filing of postjudgment motions to reconsider has become a common litigation practice, notwithstanding the Utah Rules of Civil Procedure's failure to authorize it and our previous attempts to discourage it. In this opinion, we consider whether this

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[3] *See Shipman v. Evans*, 2004 UT 44, ¶ 18, n, 5 ("Although we have discouraged these motions, they have proliferated in civil actions to the extent that they have become the cheatgrass of the litigation landscape." (Citation omitted)).

> practice tolls the time for filing a notice of appeal. We answer this question by absolutely rejecting the practice of filing postjudgment motions to reconsider.

Id. at ¶ 1.

The third category of motions for reconsideration– the one at issue in this case–are those that ask a trial court, in multiple-claim or multiple-party suits, to consider again a final decision already rendered and incorporated in a written order as to some claims or parties, but not as to all. Utah appellate courts have held that in such circumstances, "by implication Rule 54(b) of the Utah Rules of Civil Procedure does allow for the possibility of a judge changing his or her mind . . . .." *Salt Lake City Corp.*, 761 P.2d at 44; *Gillett*, 2006 UT 24, ¶ 10 (recognizing that "motions to reconsider or revise nonfinal judgments" under Rule 54(b) are not precluded by the court's decision to categorically reject post final judgment motions for reconsideration). Rule 54(b) provides that in a case with multiple claims and/or parties, such as the instant case, where the court issues a decision or enters an order "which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties," that "order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."The plaintiffs in this case have filed their respective motions to reconsider under Rule 54(b).

A court's discretion to consider such motions falls somewhere between the exceptionally broad discretion accorded to the first category, where a decision is not yet finalized, and the exceedingly narrow boundaries of the second, where a court has issued a written order or judgment disposing of an entire case. In comparison with constraints on reconsideration of final judgments, "[t]here are good reasons for institutionalizing more leeway for reconsideration in the multiple-party or multiple-claim case:"

> Rule 54(b) recognizes that in complex cases it is often efficient to decide parts of the dispute *seriatim*. However, a disposition of one of many claims or as to one of many parties–which made sense when it was looked at in isolation–may make less sense when other pieces of the puzzle are subsequently examined. Rule 54(b) allows

> courts to readjust prior rulings in complex cases as subsequent developments in the case might suggest, unless those rulings disposed of entire claims or parties *and* those ruling were specifically certified as final.

Salt Lake City Corp., 761 P.2d at 44 (emphasis in the original). Nevertheless, such motions are not encouraged, because of the need for appropriate finality in the litigation process:

> "If the party ruled against were permitted to go beyond the rules" and obtain a different ruling on reconsideration, why should not the other party who is now ruled against be permitted to make a motion for re-re-consideration . . . .?" "Practical expediency demands that there be some finality to the actions of the court . . . ."

Id., n.4 (citations omitted). The cautionary policies underlying reconsideration are identical to those underlying the very similar and overlapping "law of the case" doctrine:

> Although any judge is free to change his or her mind on the outcome of a case until a decision is formally rendered, the "law of the case" doctrine is employed to avoid delay and to prevent injustice. The purpose of [this] doctrine is that in the interest of economy of time and efficiency of procedure, it is desirable to avoid the delays and the difficulties involved in repetitious contentions and ruling upon the same propositions in the same case. Although a trial court is not inexorably bound by its own precedents, prior relevant rulings made in the same case are generally to be followed.

Id. at 45; *see Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306, 1311 (Ut.Ct.App. 1994).

Because of these concerns and the permissive nature of Rule 54(b), "trial courts are under no obligation to consider motions for reconsideration," and as a consequence, "any decision to address or not to address the merits of such a motion is highly discretionary." *Tschaggeny*, 2007 UT 37 at ¶ 15; *see also, U.P.C., Inc. v. R.OA. General, Inc.*, 990 P.2d 945, 958 (Ut.Ct.App. 1999) ("'A trial court's ruling to grant or deny a motion to reconsider summary judgment is within the discretion of the trial court . . . .'" (citation omitted)). In this regard, a party requesting that a court reconsider and overturn a prior ruling must provide an adequate reason for the court to disturb what has already been decided:

> A court can consider several factors in determining the propriety of reconsidering a prior ruling. These may include, but are not limited to, when (1) the matter is presented in a different light" or under "different circumstances;" (2) there has been

> a change in the governing law; (3) a party offers new evidence: (4) "manifest injustice" will result if the court does not reconsider the prior ruling; (5) a court need to correct its own errors or (6) an issue was inadequately briefed when first contemplated by the court.

Trembly, 884 P.2d at 1311 (citations omitted); *UPC*, 990 P.2d at 958-59.[4]

With this guidance in mind, the court considers the plaintiffs' motions for reconsideration.

B. THE HJS PLAINTIFFS' MOTION FOR RECONSIDERATION

The HJS plaintiffs ask this court to reconsider and overturn Judge Brian's decision, set forth in the First Memorandum Decision, granting summary in favor of defendants on the vacation pay issue. Plaintiffs contend that Judge Brian came to an unexpected and unsupported conclusion based on an analysis that the plaintiffs could not have anticipated in connection with either the briefing or argument on the first summary judgment motion. The essential defect they point to in Judge Brian's analysis is that he failed to consider the BLA as a whole, relying only on Section 12, the Vacation section, when he should have considered a number of other specific sections of the BLA that impact the interpretation of key language of Section 12. They contend that, as a result of this too-narrow reading of the BLA, Judge Brian wrongly concluded that the steelworker plaintiffs were not entitled to 1987 vacation pay and therefore wrongly granted summary judgment on that issue against them. Plaintiffs claim that a number of the *Trembly* factors support reconsideration, including presentation of the matter in a different light, manifest injustice, the need for the court to correct its own errors, and inadequate briefing. *See* HJS Plaintiffs' Memorandum in Opposition to Defendants' Joint Motion to Strike ("Plaintiff's Opposition to Motion to Strike") at 3-6. Defendants respond that the

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[4] In *Thurston v. Box Elder County*, 892 P.2d 1034 (Utah 1995), the court noted that "[t]he exceptional circumstances under which courts have reopened issues previously decided are narrowly defined: (1) when there has been an intervening change of controlling authority; (2) when new evidence has become available; or (3) when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice." *Id.* at 1039. These factors appear to be nearly identical to certain of the *Trembly* factors and do not appear to constrain a court from considering additional factors, such as those addressed in *Trembly*.

arguments about BLA interpretation that plaintiffs make now were never presented to the court during the first summary judgment proceedings and that they should not be permitted to raise them for the first time in a motion for reconsideration filed at this late stage of the litigation process.

In order to adequately consider plaintiff's position, it is necessary to examine the arguments that were made to Judge Brian in connection with the first summary judgment motion and their relationship to his final decision on the vacation pay issue, as set out in the First Memorandum Decision.

1. **The First Summary Judgment Proceeding**

a. The Parties' Arguments

In their Memorandum in Support of Joint Motion of Defendants for Summary Judgment ("Defendants' Summary Judgment Memorandum"), the defendants pointed out that both plaintiffs and defendants agreed that Judge Jenkins' decision in *Pickering* set the basic framework for determining what relief the plaintiff steelworkers were entitled to recover from USX in the federal action. Defendants' Summary Judgment Memorandum at 9-10. They then quoted portions of that decision indicating that a bellwether plaintiff was entitled to "an award of back pay" that included, among other things, "vacation pay" and that the test for what compensation must ultimately be awarded to individual plaintiffs "must be measured within the terms of the 1987 BLA , [and] Pension Agreement, as if [plaintiffs] had remained active employees who were terminated when Geneva was sold to BM&T, that is, on August 31, 1987." *Id.* at 10-11 (quoting *Pickering* at 56 and 41) (emphasis added; internal quotation marks and citation omitted).

Defendants then argued that, because under the BLA ("Section 12-Vacations") vacation pay accrued in 1987 was not payable until January 1, 1988 (a premise not disputed by plaintiffs), plaintiffs were not entitled to an award of 1987 vacation pay, because (under *Pickering*) they were deemed terminated as of August 31, 1987. Defendants' conclusion here is based on their

interpretation of Section 12.A.3 of the BLA ("BLA § 12.A.3"[5]), referred to by the parties as the "forfeit" provision. Because the way the argument was made is important here, it is useful to quote defendants' argument at some length:

> While the BLA provides that working a certain amount of time in 1987 may entitle a steelworker to vacation pay in 1988, **this is only true if the worker is still an active employee of USX on January 1, 1988**. This is made clear by Section 12A.3 of the BLA.
>
> > An employee even though otherwise eligible under this Subsection A, forfeits the right to receive vacation benefits under this Section if he quits, retires, dies or **is discharged prior to January 1 of the vacation year**. [Emphasis added]
>
> Thus, to be entitled to vacation pay for 1988, a steelworker had to meet two requirements: (1) not be absent six consecutive months in 1987, and (2) be an active employee on January 1, 1988. Pursuant to Judge Jenkins's ruling, Plaintiff met the first requirement. However, that same opinion held that none of the Plaintiff steelworkers could satisfy the second requirement. As set forth above–and as in fact stated by Plaintiffs in their interrogatory answers–Judge Jenkins ruled that all of the steelworkers at Geneva were legally terminated by USX as of August 31, 1987, which explains why Judge Jenkins carefully limited the back pay award to benefits that would have been received in 1987.

Defendants' Summary Judgment Memorandum at 11-12 (all emphasis in the original).

Defendants' arguments regarding the vacation pay issue thus amount to a logical syllogism: (1) Judge Jenkins' decision provided that plaintiffs are entitled to vacation pay for 1987, as provided for in the BLA, as if they were terminated from employment as of August 31, 1987; (2) Section 12.A.3 of the BLA provides that an employee forfeits vacation pay benefits for 1987 if he "is discharged prior to January 1 of the vacation year", i.e, January 1, 1988; (3) this BLA provision means that, in order to be eligible for 1987 vacation pay, a steelworker must have been an "active employee on January 1, 1988;" (4) because all the steelworker plaintiffs were deemed terminated

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[5] The parties and Judge Brian refer to this section variously as "12A.3," "12-A-3" and "12(A)(3)," The court believes "12.A.3" conforms better to the BLA's own numbering style and uses it here.

from employment as of August 31, 1987, none of them were active employees–and thus eligible for 1987 vacation pay–on January 1, 1988; and (5) the plaintiffs therefore were not entitled to 1987 vacation pay payable in 1988.

While not stated in so many words, clearly and necessarily implied in this argument is the premise that the term "discharged" in Section 12.A.3 of the BLA means the same thing as word "terminated" in Judge Jenkins' decision. The nature of that premise is highlighted and made unmistakable by the emphasized portions of the Defendant's Summary Judgment Memorandum.

Yet, in their responsive memorandum plaintiffs failed to contradict in any way the implicit conclusion that, in the context of section 12.A.3 of the BLA, the two words "terminated" and "discharged" were legally and functionally equivalent. Rather, in support of their argument that BLA must be "taken as a whole" and that defendants had too narrowly construed the BLA's vacation pay forfeiture provision by "[r]elying exclusively on Section 12(A)(3) of the BLA . . . ," plaintiffs directed the court's attention only to BLA "APPENDIX R, LETTER OF AGREEMENT ON 1987 VACATION PAY ELIGIBILITY" and to Appendix Q, which establishes a context for Appendix R in its expressed "concern regarding the Geneva plant's future." Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment ("Plaintiff's Summary Judgment Opposition Memorandum") at 26-27 and n.9 (emphasis in the original). Plaintiffs then note that, while defendants and plaintiffs agree that, under the BLA, vacation pay accrued during one year is not paid until the following year, they disagree with defendants' restrictive interpretation of BLA § 12.A.3, because Appendix R modified BLA section 12.A.3 by adopting new criteria for eligibility for vacation pay:

> However, similarities between plaintiffs' and Defendants' positions end at this point because the Steelworkers assert that Section 12-A-3 and the application thereof was amended via adoption of the new eligibility criteria set forth in Appendix R. Under the Letter of Agreement modification [i.e., Appendix R], a Steelworker only had to satisfy one of the criteria in order to qualify for deferred vacation pay in the next

> year. Thus, the Steelworkers became eligible for deferred vacation pay in 1988 that had been vested or accrued in 1987. More specifically, the Steelworkers assert that, in accord with the market conditions described in Appendix Q, II, and in light of the "continuing concern" shared by "the Union and the Company", USX assured the Steelworkers that the criteria introduced via Appendix R would remain, and did remain, in place with respect to vacation years 1987-1988.

Id. at 27-28 (emphasis in the original, citations omitted). Neither in briefing nor in oral argument did the plaintiffs claim, as they do now, that any other provisions of the BLA were relevant to the issue of eligibility for 1987 vacation pay payable in 1988.

In their reply brief, defendants argued that Appendix R amended only the eligibility criteria of BLA section 12.A.3 and did not change the provision for forfeiture of vacation pay for which a plaintiff was otherwise eligible if not actively employed in 1988. Reply Memorandum in Support of Joint Motion of Defendants for Summary Judgment at 6-8.

b. Judge Brian's Decision

In the First Memorandum Decision, Judge Brian summarized the positions of both plaintiffs and defendants with regard to the vacation pay issue and essentially accepted the defendants' arguments:

> Reviewing § 12-A-1-b of the BLA, to be eligible for vacation pay in 1987, an employee must be employed for six months. However, such right is forfeited if the employee "quits, retires, dies or is discharged prior to January 1 of the vocation year" then the employee forfeits the right to receive vacation benefits. BLA at § 12-A-3. Appendix R amends the eligibility requirements to include two additional ways to be eligible for vacation pay, but is silent on the forfeit issue. Although the Plaintiffs desire that the Court view Appendix R as striking the forfeit exception, the Court cannot do so. * * * Without express language striking or amending the forfeit language, the Court must read the BLA as a whole, which includes the forfeit language of § 12-A-3. The Court concludes that any vacation pay that might have accrued in 1987, to those eligible was not payable in 1988 because such vacation pay was forfeited when they were all effectively discharged on August 31, 1987, which was prior to January 1, 1988. As found in *Pickering* [Judge Jenkins' decision], none of the plaintiff steelworkers were employed by USX as of January 1, 1988. Therefore, this Court concludes that none of them were entitled to vacation pay accrued in 1987, that was payable in 1988.

First Memorandum Decision at 11.

It is clear from this language that, in granting summary judgment to defendants on the vacation pay issue, Judge Brian ruled based on the arguments presented to him by the parties. Plaintiffs' motion for reconsideration on the vacation pay issue, however, is based on the contention that Judge Brian unexpectedly went off on a legal excursion of his own, beyond the boundaries of the parties' arguments.

2. **The HJS Plaintiff's Motion for Reconsideration**

In order to justify the failure to timely raise the arguments they now make, plaintiffs portray Judge Brian's analysis of the vacation pay issue as entirely unforeseeable to either side. They assert that "the Court surprised all parties by focusing on a provision in the BLA which neither party had argued was applicable and which neither party anticipated the Court would find applicable to the circumstances of the steelworkers' layoff." HJS Plaintiff's Opposition to Motion to Strike at 4. The provision that was the subject of this surprised reaction was the "discharge" language in the forfeit provision, BLA § 12.A.3:

> The Court held, without explanation or contract analysis, that the steelworker plaintiffs had been *discharged* when the plant was sold in August 1987 and that they were not, therefore, entitled to vacation pay in 1988. In applying the "discharge" language of the forfeit provision to these circumstances, and despite its recognition of the requirement that the provisions of the BLA be construed "as a whole", the Court made no attempt to define and properly apply the term "discharge" and no other section of the BLA was cited in support of the Court's interpretation of the term. Nor had Judge Jenkins in the underlying ruling ever held that the Geneva steelworkers were "discharged" as the term is defined and applied in the BLA.

Id. (emphasis in the original).

Plaintiffs' argument that the vacation pay ruling should now be reconsidered is that, considered as a whole, "under the BLA an employee is 'discharged' only for disciplinary reasons or breach of the duties of employment" and that Judge Brian was therefore wrong when he, in effect, equated Judge Jenkins' ruling that the steelworkers were "terminated" (or simply lost their employment due to the sale of Geneva) as of August 31, 1987, with "discharged" as the term is used

in the forfeit provision of BLA § 12.A.3. *Id.* at 4-5; *see* HJS Plaintiffs' Motion for Reconsideration Memorandum at 2-4. In advancing this position, plaintiffs correctly note that in construing the terms of a contract, Utah courts have held that "'it is axiomatic that a contract should be interpreted so as to harmonize all of its provisions and all of its terms'" and that in order "'to harmonize the provisions of a contract, we examine the entire contract and all of its parts in relation to each other and give a reasonable construction of the contract as a whole to determine the parties' intent.'" *Id.* at 5-6 (citations omitted; emphasis in the original). Plaintiffs then perform a detailed exegesis of pertinent sections of the BLA (a contract containing twenty-one main sections in 162 pages and thirty-three appendices, the whole totaling 272 pages) asserting that the term "discharge" in sections 3 (Management) and 8 (Suspension and Discharge Cases) is used in the context of for-cause firings, including management authority to "discharge" employees and disciplinary proceedings leading to sanctions including being "discharged" for cause, while section 16 (Severance Allowance) deals with the company's ability to close departments or entire plants and the entitlements of employees "whose employment is terminated either directly or indirectly as a result thereof. . . ." *Id.* at 10-18 (emphasis omitted). Plaintiffs conclude that in the light of this analysis of the contract as a whole, the term "discharge," as used in BLA § 12.A.3 can be construed to effect a forfeiture of vacation pay only for those fired for cause and not as to those "terminated" as the result of a plant closing, as occurred at Geneva. *Id.* at 17-18.

Thus, plaintiffs seek reconsideration based on a theory of BLA contract interpretation they never raised in connection with the first summary judgment proceedings before Judge Brian.[6] As

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[6] Plaintiffs contend that this court must consider the merits of their new arguments in order to determine whether reconsideration is appropriate, because the central issue presented for reconsideration "is whether Judge Brian committed a manifest error in law by concluding, via examination of only one section of the BLA, that Plaintiffs were 'discharged' under the terms of the BLA." Plaintiff's Opposition to Motion to Strike at 4-5. They contend that the court cannot determine if it is proper to strike their motion for reconsideration without "giving due consideration

discussed above, however, the issue of the meaning of the term "discharge" in BLA § 12.A.3, and whether it was equivalent to Judge Jenkins' term "termination," was clearly, if implicitly, raised by the defendants' arguments in connection with their motion for summary judgment. And by failing to raise the issue, plaintiffs tacitly accepted the defendants' necessary underlying premise that the two terms were equivalent, a position this court concludes that Judge Brian was justified by plaintiffs' silence in accepting.

Plaintiffs now contend, however, that they could not have foreseen the path of Judge Brian's decision and take him to task for failure to undertake, on his own, the detailed analysis of the broader provisions of the BLA which plaintiffs had never presented to him, but now advance in their quest for reconsideration. Plaintiffs' own language demonstrates the complicated approach they take to deflect the responsibility for this situation to Judge Brian:

> Plaintiff's counsel did not and could not reasonablely foresee the Court's interpretation of the so called "forfeit" provision in the BLA as precluding the payment of vacation benefits in 1998, as neither party had argued for or against a claim that the Plaintiffs had been "discharged." * * * Plaintiffs simply did not anticipate, and could not reasonably be expected to anticipate, that the Court would, on the one hand acknowledge Plaintiffs were eligible to receive vacation pay in 1988, but on the other hand completely ignore the BLA's severance provisions and conclude Plaintiffs had been fired (i.e., "effectively discharged").
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> * * *
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> Moreover, and most importantly, the Court offered no explanation, no findings, and provided no reasoning in support of its determination that these Plaintiffs were

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to the substantive arguments made in such Motion." *Id.* at 5. The court has thoroughly reviewed their Memorandum supporting the motion for reconsideration, along with pertinent sections of the BLA, the entirety of which is attached thereto. Based on that review and the court's review of the memoranda submitted by the parties in connection with the defendants' first summary judgment motion, the court believes that the plaintiffs' present arguments about the meaning of "discharge" in BLA § 12.A.3 are colorable and perhaps more persuasive than the argument they actually made to the court at the time. Therefore, for purposes of the motion to strike, the court will assume, without so deciding, that there is "reasonable likelihood that absent the error, the outcome . . . would have been more favorable" on the vacation pay issue in the first summary judgment proceeding had plaintiffs made the arguments regarding the meaning of the BLA they now advance in their motion for reconsideration. *Cf. State v. Verde*, 770 P.2d 116, 122 (Utah 1989) (explaining the meaning of harmful error in the context of the "plain error" doctrine).

> "effectively discharged," other than an oblique reference to the *Pickering* Court's finding that "none of the steelworkers were employed as of January 1, 1998." Ironically while correctly recognizing that it "must read the BLA as a whole," the Court never considered whether the term "discharged" was expressly defined under the BLA, whether when viewed against other provisions in the BLA the term carried a particular meaning, or whether the term as used by the Court would be inconsistent with and render other BLA provisions meaningless. * * *
>
> Even if one were to argue that the court covered its tracks by holding that the Plaintiffs were "effectively" discharged, such an interpretation would disregard the plain meaning of Section 12-A-3 and wholly fail to examine the BLA *as a whole* in considering whether the "effects" discharge were distinguished from the "effects" of some other event (*e.g.*, plant closure). As such, the Court improperly imposed a judicial revision of a complex agreement that was vigorously negotiated between very sophisticated parties.

HJS Plaintiffs' Motion for Reconsideration Memorandum at 10-12 (emphasis in the original); *see also, id.* at 19 ("... Plaintiffs did not and could not reasonably anticipate the Court's *sua sponte* and wholly unsupported legal conclusion that Plaintiffs had been 'discharged' for purposes of BLA § 12-A-3 . . . ."). The plaintiffs go on to say that in making his decision, Judge Brian acted "[i]n disregard of the established rules of contract construction and interpretation" (*id.* at 13), "concluded without any support whatsoever that the term 'discharged' should be . . . used interchangeably with phrases such as 'no longer employed.'" (*id.* At 14), acted beyond his "authority" in making "a judicial misinterpretation and revision of the BLA" that was "not proper" (*id.* at 15-16), and "disregarded [the Court's] own directive to 'read the BLA as a whole' and simply assumed without ever considering, for example, BLA sections 3, 8 or 16, that Plaintiffs had been 'effectively discharged' for purposes of BLA § 12-A-3" (*id.* At 20).

Plaintiffs conclude that Judge Brian was obligated, but failed, to follow a process of contract interpretation like that outlined in *Ford v. American Express Advisors, Inc.*, 2004 UT 70, examining all the relevant provisions of the contract as a whole, and that, had he done so, he would have necessarily reached a different conclusion. *See id.* at 7-8. Ironically, while contending that he was obligated to follow his own mandate to "read the BLA as a whole," in opposing the first summary

judgment plaintiffs never mentioned any of the sections of the BLA they now assert should have governed his decision. Nor did plaintiffs provide Judge Brian with a copy of the entire BLA or even the pertinent sections they now cite to in arguing that support of reconsideration. The only portions of the BLA plaintiffs provided in connection with the briefing of the first summary judgment motion appear to have been BLA § 12 ("Vacations") and Appendices Q and R. *See* defendants' Affidavit of Allen K. Young, Exhibit C; plaintiff's Memorandum in Opposition to Motion for Summary Judgment, Exhibit D. This is consistent, of course, with the limited argument they made at the time. Only now do plaintiffs provide a copy of the entire BLA to the court, attached to the HJS Plaintiffs' Motion for Reconsideration Memorandum.

3. **Should the Court Reconsider the Vacation Pay Issue?**

The issue then, is whether, under all the circumstances here, the court ought to exercise its discretion to reconsider the merits of the vacation pay issue at this point in the litigation process. As stated earlier, plaintiffs assert that four of the *Trembly* factors are pertinent to this analysis. Each will be addressed below.

a. Is the Issue Presented in a Different Light or Under Different Circumstances?

An example of what it means to present an issue in a different light is found in *Trembly*, where the court decided that a trial court was justified in reconsidering a prior denial of defendant's summary judgment motion in light of two subsequent Utah Supreme Court cases that, while not changing the law, found summary judgment appropriate in analogous fact situations. *Trembly*, 884 P.2d at 1311. Presumably, a different light could also be cast by subsequently discovered documents or other evidence that, while not in direct contradiction to the evidence that supported a prior ruling, could suggest a legal or factual interpretation that calls for reassessment. Or a subsequent proceeding in the case, such as another summary judgment motion or motion in limine, might show

that the prior ruling is inconsistent with the broader issues of the case or conflicts with other conclusions that the court is then convinced are appropriate.

In this case, plaintiffs advance a new contract interpretation argument based on sections of the BLA that were not brought to the court's attention in earlier proceedings. These additional sections of the BLA do appear to shed a different light on the issue of whether "discharge" and "termination" were interchangeable concepts as they relate to vacation pay forfeiture under BLA § 12.A.3. Nevertheless, while plaintiffs have now provided the court with a copy of the full 1987 BLA, that document was unquestionably available to them (and not provided to the court) before and is not new in any sense.[7] As discussed earlier, the argument they now present, based on a broader reading of the BLA, was a natural and obvious response to defendants' summary judgment contentions at the time they were first made, yet they did not make that argument, even though it was clearly available to them and called for at the time.

In addition, defendants filed a second motion for summary judgment soon after Judge Brian's first Memorandum Decision. That motion built upon the relief they had received in the First Memorandum Decision regarding the vacation pay issue by arguing that the ruling resolved in defendants' favor a major premise of the majority of the claims for relief stated in plaintiffs' Third Amended Complaint. *See, e.g.,* Second Joint Motion of Defendants for Summary Judgment on All Remaining Claims of Plaintiffs at 2 ("This motion is made upon the ground that the court previously granted summary judgment on the major claim asserted by Plaintiff in this action relating to the alleged failure to receive 1988 vacation pay as part of the settlement with USX Corporation . . . .");

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[7] In fact, plaintiff Chilton, in a letter to the court, dated May 18, 2006, asserts that HJS plaintiffs' counsel, prior to the summary judgment hearing, had considered arguments addressing the different meanings of discharge and termination as used in the BLA, to the extent of preparing exhibits addressing the issue. Mr. Chilton repeated this at the February 5, 2007 hearing, without contradiction from counsel.

Memorandum in Support of Second Joint Motion of Defendants for Summary Judgment on All Remaining Claims of Plaintiffs at 13-14. Certainly, this was a point at which plaintiffs were called on to shed a different light on the vacation pay issue, yet they did not do so, and the Second Memorandum Decision implicitly tiered on the earlier vacation pay in granting summary judgment on most of plaintiffs' remaining claims for relief.

Thus, the "different light" factor cannot be considered in a vacuum. While plaintiffs have presented the vacation pay issue in a different light, that light was readily available at the time of the first summary judgment proceeding. Plaintiffs simply failed to turn it on by making the arguments to Judge Brian that they now raise for the first time nearly a year after his First Memorandum Decision. Nor have they shown any meaningful justification for not doing so. In the meantime, after a lengthy process, the court has issued two Memorandum Decisions granting summary judgment on all but a single, distinct issue, "whether Defendants breached their fiduciary duty in how they created and implemented the hearing process (Second Memorandum Decision at 26)). That issue is now the subject of defendants' pending third motion for summary judgment.

The court therefore concludes that the fact that plaintiffs have now presented the vacation pay issue in a different light does not alone warrant reconsideration.

b. Was the Issue Inadequately Briefed When First Presented to the Court?

There is no question that the vacation pay issue was inadequately briefed by the plaintiffs in connection with the first summary judgment proceeding. Like presentation in a different light, this factor cannot be assessed independently of the context in which it is raised. Were this factor to mean that every time a party presented deficient briefing on an issue it could simply resubmit the same issue more thoroughly or with a new legal or factual theory after an adverse ruling, it would have serious consequences for the litigation process. Litigation would be unduly prolonged by repeated contests over the same ground by parties operating with the hope that if they simply

persevered they would finally get a "right" decision. This would remove the incentive for counsel to present their best research and analysis the first time around and would seriously undermine established principles of finality and economy in litigation. *See Salt Lake City Corp.*, 761 P.2d at 44, n.4. Moreover, such an approach would reward those least diligent and penalize those who worked the hardest to fulfill their obligations as advocates. For reasons like these,

> Motions for "reconsideration" will not be granted absent "highly unusual circumstances"–they do not provide litigants with an opportunity for a "second bite at the apple" or allow them, like Emperor Nero, to "fiddle as Rome burns", or license a litigation "game of hopscotch", allowing parties to switch from one legal theory to a new one "like a bee in search of honey". Such motions are not vehicles for relitigating old issues. Courts properly decline to consider new arguments or new evidence on reconsideration where those arguments or evidence were available earlier.

MacArthur v. San Juan County, 405 F.Supp.2d 1302, 1305-1306 (D.Utah 2005) (emphasis added), *quoting* Steven Baicker-McKee, William M. Janssen & John B. Corr, *Federal Civil Rules Handbook,* 962 (2006 ed.) (footnotes omitted by the court).

Based on these considerations, the court concludes that the "highly unusual circumstances" required for reconsideration based on inadequate briefing must involve an explanation that substantially justifies the failure to adequately address the issue in the first instance. *Cf.* Ut.R.Civ.P. 60(b)(1) ("On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . .").[8]

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[8] *See also MacArthur*, 405 F.Supp.2d at 1306 (citing *Cashner v. v. Freedom Stores*, 98 F.3d 572, 576 (citing 7 James Wm. Moore et. al., Moore's Federal Practice P 60.22[2] (2d ed.1985))." . . . the kinds of mistakes remediable under a Rule 60(b)(1) motion are litigation mistakes that a party could not have protected against."); *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 577 (10th Cir. 1996) ("If the mistake alleged is a party's litigation mistake, we have declined to grant relief under Rule 60(b)(1) when the mistake was the result of a deliberate and counseled decision by the party.").

In this case, plaintiffs claim that, in the First Memorandum Decision, "the Court surprised all parties by focusing on a provision in the BLA which neither party had argued was applicable and which neither party anticipated the Court would find applicable to the circumstances," thus implying that the court had ruled on a basis that neither party had briefed. *See* HJS Plaintiffs' Opposition to Motion to Strike at 4. As discussed above, however, Judge Brian's ruling in this regard could not have been a surprise, as it was clearly invited by the defendants' arguments and tacitly condoned by the plaintiffs' failure to put forth any contract-based opposition to this position other than BLA Appendices Q and R. In other words, if *plaintiffs* failed to adequately brief the vacation pay issue, it was not inadequately briefed by the *defendants*. Defendants set out a logical, if not unassailable, interpretation of BLA § 12.A.3 that steelworkers not actively employed as of January 1, 1988, were not entitled to vacation pay for 1987, that the plaintiffs were not so employed because they were terminated as of August 1, 1987, per *Pickering*, and that they were therefore not entitled to 1987 vacation pay. The underlying but obvious premise on which that argument rested was that the word "discharged" in BLA § 12.A.3 meant the same thing as the word "terminated" under the *Pickering* decision. The defendants having raised this issue, it was plaintiffs' burden to raise all meaningful, readily-available defenses. As discussed earlier in this decision, the argument plaintiff's now raise was clearly called for as a response to defendants' summary judgment position and was readily available at the time.

The court therefore concludes that the fact that plaintiffs inadequately briefed the vacation pay issue does not alone warrant reconsideration.

4. Does the Court Need to Correct its Own Errors?

The central argument of plaintiffs' motion for reconsideration is that "Judge Brian committed a manifest error in law by concluding, via examination of only one section of the BLA, that

Plaintiffs were "discharged" under the terms of the BLA[.]" Defendants' Opposition to Motion to Strike at 4-5.

Plaintiffs do not now claim that Judge Brian erred in deciding that Appendices Q and R did not amend the forfeit provision of BLA 12.A.3, which was the only argument plaintiffs presented him with in their briefing at the time. Having reviewed the parties' summary judgment memoranda that were before Judge Brian, this court believes that Judge Brian's decision regarding the arguments then presented to him was not wrong on its face; in fact, the decision appears reasonable in the context of what was presented to him. Rather, plaintiffs claim he was wrong in his ultimate decision based on other sections of the BLA and that his failure thus to consider the BLA as a whole amounted to manifest error. *See* Defendants' Opposition to Motion to Strike at 4-5. While not using the term itself, plaintiffs appear to be invoking a sort of "plain error" principle here. A plain or manifest error is one that so evident "'that it should have been obvious to a trial court that it was committing error.'" *State v. Verde*, 770 P.2d 116, 122 and n. 11 (Utah 1989) (treating "plain" and "manifest" error as equivalent terms) (citation omitted). Judge Brian committed no manifest error here.

As discussed at length above, the argument plaintiffs now make (and apparently were aware of at the time) is based on an interpretation of the interrelationship of multiple sections of a 162-page agreement that plaintiffs did not provide, cite or argue to the court at the time. Although they attempt to lay the blame for this at the judge's feet, if the court ultimately reached a wrong conclusion in this regard, it was due to the plaintiffs' own failure to raise then the arguments that they make now. In fact, the plaintiffs invited the error they now identify when they responded to the defendants' argument–that the forfeit provision precluded 1988 payment for 1987 vacation pay because the steelworkers had been terminated as of August 31, 1987)–not by arguing that "discharge" in BLA 12.A.3 was not equivalent to "terminated," but by asserting only that two BLA

appendices modified that provision. *Cf. Pratt v. Nelson*, 2007 UT 41, ¶ 17 ("Our invited error doctrine arises from the principle that a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error."). Plaintiffs thus tacitly accepted that, *without modification*, BLA 12.A.3 had the effect defendants claimed, leaving Judge Brian with no reasonable basis to rule in plaintiffs' favor on the issue once he determined that the forfeit provision *had not been modified* by the appendices. Thus, the plaintiffs are not asking that the court "correct its own errors," as the *Trembly* factor anticipates, but that this court to correct plaintiffs' error.

The court therefore concludes that a need to correct the court's own errors does not alone warrant reconsideration.

5. Will Manifest Injustice Result If the Court Does Not Reconsider the Prior Ruling?

Plaintiffs assert that, with regard to the vacation pay issue, "[t]he court's interpretation is clearly in error and manifest injustice will result if the Ruling is not revised." Plaintiffs' Motion for Reconsideration Memorandum at 19. The plaintiffs failure to address in the first instance the contract interpretation arguments they now raise has undeniably put them–and now this court–in a difficult position. The plaintiffs have not shown circumstances warranting relief under any of the other *Trembly* factors, either individually or commutatively, because the error they now assert occurred as a result of their own failure to raise an readily-available argument that was clearly called for the time of the prior proceedings. As is the case with the "plain error" doctrine, however, the "manifest injustice" factor, along with the other *Trembly* factors, "ultimately permit the . . . court to balance the need for procedural regularity with the demands of fairness." *Cf. State v. Verde*, 770 P.2d at 122, n. 12. The issue here, then, is whether the court ought to reconsider the vacation pay issue because demands of fairness outweigh the need for finality and the procedural irregularities underlying the plaintiffs' motion.

Fairness from the plaintiffs' perspective involves the correction of a presumed error that resulted in the loss of an important claim. But the loss of a meritorious claim is not conclusive of injustice. For instance, statutes of limitation, pre-litigation notice requirements, defaults, and waivers, among a number of other things, result in meritorious claims being lost in the interest of countervailing policies, such as finality, predictability, the encouragement of diligent pursuit of rights, and fairness to opposing parties. Thus, the potential that plaintiff will lose a claim here (or will have to further address the matter on appeal) must be balanced against the detriment of re-opening the matter at this stage of the litigation process. The court concludes that the balance does not favor plaintiffs.

First, the motion for reconsideration is untimely. The First Summary Judgment Motion was filed on April 6, 2005, and the First Memorandum Decision, which plaintiffs ask the court to reconsider, was issued on September 22, 2005. Mr. Chilton's and Mr. Glazier's motions for reconsideration were filed, respectively, on August 2, 2006, and August 18, 2006, more than ten months after the decision, while the HJS plaintiffs' motion to reconsider was filed on September 11, 2006, nearly a year after the decision. *See Tschaggeny*, 2007 UT 37, ¶ 17 ("there was ample support" for the trial court's decision to deny a motion to reconsider where the movant "waited more than seven months after the initial motion in limine was filed and almost three months after it was granted . . . ."). Certainly the surprise plaintiffs experienced at the nature of Judge Brian's ruling on the vacation pay issue was no less acute at the time it was issued than when the motion for reconsideration was filed nearly a year later.

Further the time that has passed has seen procedurally significant changes in the status of the case. Shortly after the First Memorandum Decision, on October, 12, 2005, the defendants filed a further summary judgment motion, on October 12, 2005, building in part on the relief they had just been granted. That motion was decided by the Second Memorandum Decision on January 13, 2006,

in which the court granted summary judgment in defendants' favor on all the remaining claims in the six claims for relief in the Third Amended Complaint, with only "the limited issue of whether Defendants breached their fiduciary duty in how they created and implemented the hearing process" remaining at issue in the case. On August 22, 2006, before the HJS plaintiff's motion for reconsideration was filed, defendants filed a third motion for summary judgment, addressing the remaining issue. Proceedings on that motion have been in abeyance pending resolution of the motions for reconsideration. Were the court to grant the motion for reconsideration, it would conceivably unwind a significant portion of the decisional results of months of intense effort by the parties and the court that has substantially resolved claims and narrowed issues in this complex case. While this might provide a substantial benefit to the plaintiffs, whose errors caused the problem, it would result in considerable detriment to the defendants, who have worked reasonably diligently to bring this case to its current favorable procedural state. What plaintiffs are requesting here is not a simple "readjustment" of a prior ruling on a claim decided early in a complex case that now looks differently in light of subsequent developments in the litigation process, but a substantial re-initiation of that process as a result of their own failure to raise an available argument at the appropriate time. *Cf. Salt Lake City Corp.*, 761 P.2d at 44.

In addition, reconsideration at this point would encourage delay and dilatory efforts and penalize parties who have acted with appropriate diligence in advancing their position at considerable cost. The incentives for parties to act carefully and diligently in order to avoid error, delay, inefficiency, and uncalled-for expenditure of party and judicial resources would thus be substantially undercut.

Were the negative consequences in terms of lost effort and resources relatively slight, reconsideration might be appropriate, even in the face of plaintiffs' contributory actions, but that does not appear to be the case here. Too much time has passed and too much effort has been

expended in the meantime. The court therefore does not believe that declining to reconsider the vacation pay decision in the First Memorandum Decision would result in manifest injustice, even if the issue is now presented more persuasively than it was at the time.

The court therefore concludes that defendants' objection to the HJS Plaintiffs' Motion for Reconsideration, as set forth in their Motion to Strike the HJS Plaintiffs' Motion for Reconsideration, is well taken and should be granted.

C. THE CHILTON AND GLAZIER RECONSIDERATION MOTIONS

The Chilton and Glazier Reconsideration Motions are identical and will be considered together.

The 58-page memorandum submitted as part of these motions appears to be no more than a draft memorandum, apparently prepared by an attorney and presented to the court in non-final form, with hand-written interlineations and commentary by Mr. Chilton or others. With regard to the vacation pay issue, the argument is generally similar in substance to that made by the HJS plaintiffs. The only separate issue raised is the claim that there is "new evidence" which consists of a 1988 pay stub (1099-G) issued to another steelworker, Carl Boyd, by USX, which Mr. Chilton presents as showing that steelworkers were entitled to vacation pay in 1988. The form does not refer to vacation pay and does not appear to support Mr. Chilton's position. In any event, he has not shown why this 1988 document was not available at the time of the first summary judgment proceeding. It therefore does not appear to be "new evidence" justifying reconsideration of the vacation pay issue. In addition, based on the discussion set forth above, the court has declined to reconsider the ruling in the First Memorandum Decision on that issue and will not do so based on the similar arguments made in the Chilton and Glazier Motions for Reconsideration.

The balance of the Memorandum attacks as error Judge Brian's analysis and conclusions in the Second Memorandum Decision. The argument appears to repeat with different emphasis

arguments made before the Second Memorandum Decision as they now apply to particular conclusions made in that decision. In this regard, the memorandum appears for the most part to "merely 'rehash[] arguments already fully considered' in the court's summary judgment ruling" and therefore does not provide a substantial basis for reconsideration. At oral argument, plaintiffs Chilton and Glazier focused only on the vacation pay issue and did not pursue the other issues addressed in the memorandum they submitted. Because of the irregularity of the submission of a draft document obviously not prepared by these plaintiffs, the length of the memorandum which was far beyond the length permitted by Rule 7 (and without leave of court to file such an overlength memorandum), the failure to pursue the issues at hearing, and the failure to establish any substantial basis to reconsider those issues at this point in the process, the court concludes that reconsideration of the Second Memorandum Decision, in whole or in part, is not warranted.

ORDER

It is therefore hereby ORDERED, as follows:

1. Defendants' Motion to Strike the HJS Plaintiffs' Motion for Reconsideration is GRANTED to the extent that it amounts to an objection to that motion, and the court therefore declines to reconsider the vacation pay issue decided in the First Memorandum Decision.

2. Defendants' Motion to Strike the Chilton Reconsideration Motion is GRANTED to the extent that it amounts to an objection to that motion, and the court therefore declines to reconsider the vacation pay issue decided in the First Memorandum Decision and any issue decided in the Second Memorandum Decision.

3. Defendants' Motion to Strike the Glazier Reconsideration Motion is GRANTED to the extent that it amounts to an objection to that motion, and the court therefore declines to reconsider the vacation pay issue decided in the First Memorandum Decision and any issue decided in the Second Memorandum Decision.

This is the final order of the court on the matters addressed herein, and no further order need be prepared by any party.

DATED this 6th day of June, 2007.

BY THE COURT OF UTAH

Stephen L. Roth
DISTRICT JUDGE

Appendix D

THIRD DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH
WEST JORDAN DEPARTMENT

RONALD J. CHILTON; TOM LOWE; MERDENE LOWE; DWIGHT G. EVANS; A DWAYNE RAWLINGS; ALEX COOKSEY; ALLEN S. WEBB; *et al.*,

Plaintiffs,

vs.

ALLEN K. YOUNG; YOUNG KESTER & PETRO; GERRY L. SPENCE; LYNN C. HARRIS; SPENCE, MORIARITY & SCHUSTER; JONAH ORLOFSKY; PLOTKIN & JACOBS; and JOHN DOES I-V, individuals whose true identity is unknown to plaintiffs,

Defendants.

MEMORANDUM DECISION and **ORDER**
(Defendants' Third Summary Judgment Motion and Other Pending Motions)

Case No. 030105887
Judge Stephen L. Roth

This matter is before the Court on the Joint Motion of Defendants for Summary Judgment on Plaintiffs' Remaining Breach of Fiduciary Duty Claim (the "Third Summary Judgment Motion"); the Motion for New Trial, filed by plaintiffs Ronald J. Chilton and David L. Glazier; the Objection of Plaintiffs on Denial of Motion for Reconsideration on the Vacation Pay Issue and Concurrent Motion for Court to Reverse and Correct Is Judicial Errors, filed by plaintiffs Chilton and Glazier; and certain other collateral motions and objections filed by plaintiffs Chilton and Glazier or defendants. The Third Summary Judgment Motion was set for hearing, the court does not believe that hearings are necessary or would be useful on the other motions and so decides them without hearing, based on the pleadings filed.

A hearing on the Third Summary Judgment Motion was held on September 17, 2007. Counsel did not appear at the hearing to argue on behalf of any plaintiff. Most plaintiffs were self-

represented at that point; and counsel for the remaining plaintiffs, represented by Hill, Johnson & Schmutz, L.C. ("HJS"), advised the court by facsimile letter on the day of the hearing that they would not appear to argue the matter and asked the court to rely instead on their previously-filed, written response to the Third Summary Judgment. While many of the plaintiffs were present at the hearing, only Ronald J. Chilton and David L. Glazier argued. Defendants were represented variously (as their interests appear in the file) by Richard D. Burbidge (who argued for all defendants), Burbidge & Mitchell; Julie Edwards, Howrey, L.L.P.; and Michael F. Skolnick, Kipp & Christian.

During the hearing, the court requested that the parties provide additional documents by September 21, 2007. Specifically, the court requested that the plaintiffs provide portions of the depositions of Allen Young and retired Judge Scott Daniels which they referred to at the hearing as supporting their opposition to Defendant's Third Summary Judgment Motion. The defendants were asked to provide copies of affidavits filed earlier in the case by plaintiffs that had been referred to in briefs and argument and each side was given a short time to reply to the filings by the opposing side. The parties provided these documents, which the court has reviewed. The parties continued to provide pleadings and correspondence to the court related to this motion and the court's request for documents until as late as December 10, 2007, when Mr. Glazier filed a final letter. Although there are allegations on both sides alleging failure by the opposing parties to properly copy their opponents with the documents they provided to the court, the court is confident that the parties had adequate notice of and access to the documents supplied to the court after the hearing and considers the documents as they have been provided, together with all other documents and evidence which

have been properly made a part of the record. To the extent these allegations were filed as, or amount to, motions or objections,[1] they are DENIED.

Defendant Ronald J. Chilton sent the court a letter, filed on or about September 10, 2007, requesting a postponement of the hearing date. Because the hearing date had been set weeks in advance due to the complexity of the issues and the number of parties, this request was denied as untimely. After the hearing was held, defendants filed Defendant's Joint Objection to pro se Plaintiff Chilton's Request for Postponement of Hearing on Third Motion for Summary Judgment, dated September 20, 2007. While the court did not have the benefit of that document when it decided to deny the request to continue the hearing, the defendants' reasoning parallels the court's earlier decision to not continue the hearing and sets out the basis on which the court made its decision to deny the requested continuance. Further, as discussed above, the court gave Mr. Chilton time after the hearing to submit additional materials, which he did. Defendant Chilton, by letter of October 29, 2007, requested a further hearing. Having considered Mr. Chilton's explanation of the issues he desired to address at that hearing, the court concludes that those issues have been previously aired and adequately considered and that such a hearing would not be productive. Mr. Chilton's October 29, 2007 request for an additional or continued hearing is therefore DENIED.

As explained below, the court GRANTS summary judgment in favor of defendants. The court also DENIES Mr. Chilton's and Mr. Glazier's joint Motion for New Trial and their Objection

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[1] For example, Objection of Plaintiffs on Defense's Failure to Provide Copies of Court Filing to Plaintiffs and Concurrent Motion to Compel Defense to Provide Court Filings to Plaintiffs, filed plaintiffs Chilton and Glazier on October 29, 2007, to which defendants responded, followed by plaintiffs' reply. There are also other post-hearing letters from both defendants and these two plaintiffs which the court has reviewed and considered, but which do not readily fall into a motion category, which are denied to the extent they request the court to take action not already contemplated by the motions or objections on file.

of Plaintiffs on Denial of Motion for Reconsideration on the Vacation Pay Issue and Concurrent Motion for Court to Reverse and Correct Its Judicial Errors, all as discussed below.[2]

BACKGROUND

A. THE *PICKERING* CASE AND THE USX SETTLEMENT.

The plaintiffs filed this suit against their former attorneys, alleging legal malpractice, breach of fiduciary duty, and fraudulent misrepresentation in connection with the settlement of litigation against plaintiffs' former employer, United States Steel Corporation ("USX"). The plaintiffs here are all former employees of the Geneva steel plant in Orem, Utah, owned at the time by USX and sold to Basic Manufacturing and Technologies, Inc. ("BMT"), on August 31, 1987. The defendants were co-counsel for between 1677 and 1892 steelworkers who sued USX to recover benefits they believed they had become entitled to prior to the sale of the plant.[3]

Bifurcated trials took place in federal court in 1991 and 1993, addressing, respectively, liability and damages, with Judge Bruce Jenkins making detailed written rulings in each case. Most of the plaintiffs prevailed in the liability trial. For the damages portion of the proceedings, Judge Jenkins grouped the plaintiff steelworkers into five categories: layoff plaintiffs, active plaintiffs, management plaintiffs, retired plaintiffs and "LaRoche" plaintiffs. *Pickering v. USX Corporation,*

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[2] The court believes that in the course of this memorandum decision it has addressed and decided all motions remaining in this case. To the extent any such motion is not specifically addressed in whole or in part, that motion or portion of a motion is DENIED.

[3] "Counsel represented the steelworkers individually on a contingency fee basis; each individual steelworker signed the Fee Agreement. The Fee Agreement provides that Allen K. Young entered into an agreement with the client 'for the purpose of representing client in any and all claims that he may have arising out of the interruption or termination of his employment relationship with USX Corporation.' The Fee Agreement stated: 'Should the matter proceed to trial, Lawyers shall receive 33 1/3% of any settlement or judgment obtained.' Furthermore, the Fee Agreement specifically provided that: 'Client understands that he is one member of a class of similar plaintiffs and agrees to abide by the decisions of a simple majority (51%) of that class.'" Memorandum Decision (Defendants Second Joint Motion for Summary Judgment), dated January 12, 2006 (the "Second Memorandum Decision"), at 5-6 (footnote and citations omitted).

1995 WL 584372 (D.Utah May 8, 1995) ("*Pickering*," also referred to as "Judge Jenkins' decision," "Judge Jenkins' ruling," or the "Jenkins Decision"), at 1. The damages trial, as a forerunner to a third trial that would establish damages payable to the rest of the plaintiffs, was limited to 24 bellwether plaintiffs, whose claims were considered typical of four of the categories of prevailing plaintiffs that Judge Jenkins had identified as a result of the first trial. [4] *Pickering* at 2. Judge Jenkins issued the lengthy *Pickering* decision after the second trial, and the decision addressed, among other things, the kind and scope of damages available to each category of plaintiffs. It is useful to repeat here at length the relevant underlying facts stated in the "Undisputed Relevant Facts" section of Judge Brian's Memorandum Decision (Defendants Second Joint Motion for Summary Judgment), dated January 12, 2006 (the "Second Memorandum Decision"), because they are pertinent to and set the scene for analysis of the Third Summary Judgment Motion:

> After the two trials were held before Judge Jenkins, Counsel for Plaintiffs and USX entered into settlement negotiations. A settlement offer of $47 million plus recognition of the pension benefits the steelworkers were entitled to was eventually made by USX. The Defendants mailed a letter on June 19, 1995 to each of their clients informing them of the settlement proposal. The letter informed the steelworkers of a meeting to be held June 28, 1995 at Mountain View High School Gymnasium (Settlement Meeting) to fully discuss the settlement offer and answer any questions. The letter also stated: "It is very important that as many plaintiffs as possible vote on accepting of rejecting USX's offer of settlement. We therefore request that you make every effort to attend the settlement meeting, as the vote at the meeting will bind each of you." The letter also specifically stated that the Defendants and USX agreed on what the Jenkins Decision meant for each of the steelworkers, and USX has "offered to pay the plaintiffs sums that reflect the full value of the Judgment." Two days later, on June 21, 1995, [defendant attorney Allen] Young sent out another letter to all of the steelworkers informing them of the settlement offer and the settlement meeting to be held. The letter contained a general description of the settlement offer and hearing process, and an accompanying form titled "Total Gross Payout by group" outlining what each steelwroker plaintiff would receive before attorneys' fees and taxes were deducted. In addition, the letter says,

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[4] Before the *Pickering* decision was issued, 208 retired plaintiffs and 18 layoff plaintiffs were dismissed from the case. *Pickering* at 3-4. Counsel for the plaintiffs (defendants here) negotiated a $5,000 settlement with USX for each of the retirees, all of whom accepted.

"Assuming that we can work out some technical details with USX, we will be asking you to vote to accept the offer at that time."

On June 28, 1995, the settlement meeting was held. Approximately 1,200 steelworkers attended the meeting. At the meeting, the Defendants told the steel workers that USX required that everyone must vote "yes" to the settlement or the offer would be off the table. Defendants discussed at length that each person has the right and power to vote "no" and stop the settlement for the entire group. [Defendant attorney Gerry] Spence said, "So you have the power, but you have the responsibility .... Now is it possible that we could have 1,699 [out of about 1,700 steelworkers] vote yeas and one vote no and that USX would go along with that? That's possible. Is it possible if two vote no that USX will still go? That's possible. But if one votes no and they don't want to go, they don't have to . . . ." The Defendants also encouraged the steelworkers to ask questions so they would understand the settlement agreement and what was happening.

The Defendants also told the steelworkers that they [had] demanded what [Judge Jenkins] awarded and had received an amount in "excess of the amount of money that judge granted us in his decision . . . more that the amount that the judge gave us." The Defendants [Young] told the steelworkers that "I feel with absolute confidence that what we are talking about here today represents a little more than what the judge awarded. We actually were able to get a little bit of cushion on top of that." Young also stated at the meeting that the calculations they made "[d]oesn't make everybody whole, but it makes everybody whole according to Judge Jenkins' decision."

The steelworkers were informed that the different groups of plaintiffs would receive, as a minimum, gross amounts reflected on the "Total Gross Payout by Group" chart. The minimum payment each steelworker would receive was based upon the average damage of the steelworkers in that particular category. A "hearing Worksheet for Idling Plaintiffs" was handed out showing exactly how the Defendants calculated the damages for this group, which totaled around 1,320 steelworkers, and the Defendants explained the calculations step by step. Those that had "lost more than average" could request a hearing before an independent former judge, Scott Daniels, who would have $2.33 million total, limited to a maximum recovery of $25,000 per steelworker who successfully appeals, to add to those settlements Mr. Young told the steelworkers, " . . . based on Judge Jenkins' order, . . ., based upon all of the bellwether idling plaintiffs, there is none of them that an additional $25,000 would not make 100 percent whole according to Judge Jenkins' decision . . . . I truly believe that the 2.3 million will pay all of the additional requests . . . . If by chance that didn't cover it, then you would be prorated down a little bit."

The Defendants told the group that even those plaintiffs, described by Defendants as the "LaRoche," "Managers," and "Recalled Idling" plaintiffs, who received nothing under the Jenkins Decision would receive $12,000 under the terms of the settlement. Several steelworkers asked if the $12,000 being paid to those steelworkers who lost was coming out of the prevailing steelworker's settlement. In response, Young said,

"the answer is no. You've got your average, you've got your appeal procedure if you think you're entitled to more than average, and these extra monies were in effect the attorneys' fees that are thrown back in that are your money." In addition, the Defendants directed the steelworkers to the Gross Payout handout that shows the $12,000 was included in the settlement.

At the meeting a steelworker asked why USX was not paying attorneys' fees. Defendants responded that Judge Jenkins did not award attorneys' fees, but that the Defendants used the argument that attorneys' fees would likely eventually be awarded if the case continued to leverage more money out of USX for the settlement. Defendants did point out that if attorneys' fees were ever awarded it would not be as high as the one third contingency fee the steelworkers agreed to. Young also said, ". . . if the judge ever awarded fees, those would then be thrown into any pot and you'd get two thirds of them, I'd get a third of them. That's our contract."

At that meeting, Defendants represented that as of June 28, 1995, the costs, meaning the money plaintiffs had paid the Defendants for the litigation to date, totaled $1,354,700. Those costs would be returned and deducted from the total settlement before Defendants calculated their attorneys' fees.

Those present at the meeting voted "yes" on the ballots. Counsel individually contacted the remaining steelworkers. Initially, two steelworkers held out and did not vote until later. The settlement proceeded with USX despite the fact that two steelworkers had not voted. Eventually, all 1,677 steelworkers voted "yes." The ballots informed the steelworkers that if they voted no, their counsel might withdraw and they may have to obtain new counsel. The ballots described the general terms of the settlement and also said, "It is my understanding that this ballot is not a ballot to accept or reject USX's offer, but in fact is a ballot to empower my attorneys to attempt to achieve a payment from USX for all sums due to me under Judge Jenkins' decision on the terms set for th herein."

A letter was sent to all steelworkers July 20, 1995 informing them that the settlement was proceeding and payments would start in 40 days. It also provided a schedule when the steelworkers were to come to the office to read and review the settlement agreement. Yet another letter was went on August 29, 1995 informing the steelworkers that payments were to begin[] September 5, 1995. The letter informed the steelworkers that the attorneys' fees of 33 1/3% would be deducted from the gross amount and that a check reimbursing the steelworkers for costs would be included. The final payment was made in March 1996. Each steelworker received an accounting entitled "Final Gross Payout by Group." All but a few steelworkers executed a settlement summary . . . .

Approximately 428 steelworkers participated in the hearing process before Scott Daniels and 366 received additional awards. Those that participated in the hearing process represented themselves. Scott Daniels said [in his written "Award," dated January 24, 1996], "Most of the awards involve only an arithmetic computation. These are stated without comment. Where explanation is required, it is provided."

> Scott Daniels awarded some steelworkers extra money based on exceptional circumstances. For the most part, he awarded the money according to the limitations set forth in Judge Jenkins' decision and "attempted to approve claims based on the merits of each, without regard to the total amount available." H also acknowledged "there is only so much pie to slice up." He further said, "The settlement from USX provided only a limited amount of money. An award to any one plaintiff, no matter how deserving, takes from the award of another plaintiff. It would not be fair or just to approve an award which was not within Judge Jenkins' Ruling, taking money from another co-worker whose damages were within Judge Jenkins' Ruling."

Second Memorandum Decision at 7-11 (footnotes and citations omitted, emphasis in the original).[5]

About 428 steelworkers, including 74 of the plaintiffs in the instant case, participated in the hearing process before Judge Daniels; and about 366 steelworkers, including 59 of the plaintiffs here, received awards. Affidavit of Allen K. Young in Support of Third Joint Motion of Defendants for Summary Judgment ("Young Affidavit") at ¶ 5. The total amount of awards made through the hearing process was $2,348,330.49, with $361,290.23 of that total distributed to plaintiffs in this case. *Id.* The awards made by Judge Daniels exceed by several thousand dollars the amount available under the settlement with USX, and the defendants contributed funds to make up the shortfall. *Id.*

B. PRIOR PROCEEDINGS IN THIS COURT.

On April 6, 2005, the defendants filed a Motion for Summary Judgment (the "First Summary Judgment Motion"). Defendants asserted that the plaintiffs' claims for relief, in essence, alleged that while their attorneys in *Pickering* had represented to them that the USX settlement amount included all relief they would have obtained at trial, the actual settlement amount, in fact, failed to include

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[5] In their Memorandum supporting the Third Summary Judgment Motion, defendants set out a Statement of Undisputed Material Facts, which summarizes the portion of the Second Memorandum Decision set out above, and a section of Additional Undisputed Material Facts. Defendants' Memorandum at 8-14. Plaintiffs indicated that they did not dispute defendants' statements of fact; rather, they disagreed with the inferences defendants drew from those facts and defendants' arguments based on those facts. Plaintiffs presented a number of additional facts, as well, many of which defendants disputed. Plaintiffs' Memorandum at 6-12; Defendants' Reply, at 5-7. The court's treatment of specific facts is addressed in the body of this decision.

two categories of damages to which they should have been entitled, 1987 vacation pay and an award of ERISA attorney fees. Defendants sought a summary judgment ruling that plaintiffs were not entitled to 1987 vacation pay under the USX labor agreement or ERISA attorney fees in the *Pickering* lawsuit and that, therefore, there could not have been a misrepresentation about those things. Judge Pat B. Brian granted summary judgment in defendants' favor on the vacation pay issue, but denied summary judgment on the attorney fees issue. Memorandum Decision (Defendants' Motion for Summary Judgment), dated September 22, 2005 (the "First Memorandum Decision"), at 13.

In October 2005, defendants filed the Second Joint Motion of Defendants for Summary Judgment on All Remaining Claims of Plaintiffs (the "Second Summary Judgment Motion"). In apparent response, the Haskins plaintiffs stipulated to dismissal of their claims, with prejudice, pursuant to Rule 41(a) of the Utah Rules of Civil Procedure. After briefing and oral argument, Judge Brian granted summary judgment in favor of defendants on all remaining claims in the Third Amended Complaint, except for the "issue of whether Defendants breached their fiduciary duty in how they created and implemented the hearing process" that resulted in the awards by Judge Daniels. Second Memorandum Decision, at 21, 26.

In August 2005, months after the Second Memorandum Decision and Judge Brian's retirement, defendants Ronald Chilton and David Glazier, *pro se*, independently filed what amounted to identical motions to reconsider Judge Brian's rulings set out in the First and Second Memorandum Decisions. In September 2006, the majority of the other plaintiffs, represented by Hill, Johnson & Schmutz, L.C. (the "HJS plaintiffs"), filed a motion to reconsider Judge Brian's ruling in the First Memorandum Decision to grant summary judgment in favor of defendants on the vacation pay issue. Defendants filed motions to strike the plaintiffs' various motions for reconsideration. In the meantime, defendants had filed the Third Summary Judgment Motion,

accompanied by a Memorandum in Support of Third Joint Motion of Defendants for Summary Judgment on Plaintiffs' Remaining Breach of Fiduciary Duty Claim ("Defendants' Memorandum"), seeking dismissal of the last issue remaining in the case after the Second Memorandum Decision. The court stayed proceedings on the Third Summary Judgment Motion until the plaintiffs' motions for reconsideration and defendants' motions to strike them were resolved in the court's Memorandum Decision (Motions to Strike Plaintiffs' Motions for Reconsideration), dated June 6, 2007, granting defendants' motions to strike the various motions for reconsideration.

The HJS plaintiffs, in the meantime, had filed the HJS Plaintiffs' Memorandum in Opposition to Third Joint Motion of Defendants for Summary Judgment on Plaintiffs' Remaining Breach of Fiduciary Duty Claim (the "Plaintiffs' Memorandum"), which was quickly adopted by *pro se* plaintiffs Chilton and Glazier, who filed a Notice of Joinder on January 5, 2006, which also attached an affidavit signed by both. Defendants then filed Defendants' Joint Reply Memorandum in Support of Third Joint Motion of Defendants for Summary Judgment on Plaintiffs' Remaining Breach of Fiduciary Duty Claim ("Defendants' Reply"). By the time of the hearing on the Third Summary Judgment Motion, most of the plaintiffs had entered *pro se* appearances, and only a few were still represented by Hill, Johnson & Schmutz, L.C. ("HJS"). As noted earlier, on the day of the hearing, HJS sent the court a letter indicating that in light of its termination by most of the plaintiffs and its inability to communicate with the remainder, it would not be making an appearance to argue the Third Summary Judgment Motion, and would instead rely on Plaintiffs' Memorandum as providing an adequate opposition. The letter further stated HJS's expectation that the court would apply the arguments in the Plaintiffs' Memorandum to all plaintiffs.

At the hearing on September 17, 2007, the court indicated that it was proceeding on the assumption that all plaintiffs, whether or not represented by HJS, adopted the positions taken in the HJS Memorandum and in any presentations made at the hearing by plaintiffs Chilton and Glazier,

who were the only plaintiffs to argue.[6] No one present at the hearing voiced any disagreement with that assumption, and the court has proceeded in accordance with it. In reaching its decision here, the court has considered all filings described or referred to above and in the body of the discussion that follows, along with other pertinent pleadings on file in this case.

DISCUSSION

THE THIRD SUMMARY JUDGMENT MOTION

The sole issue remaining in this case after the court's rulings on the defendants' first two motions for summary judgment "is the limited issue of whether Defendants breached their fiduciary duty in how they created and implemented the hearing process." Second Memorandum Decision at 26. This claim is part of the HJS plaintiffs' Third Cause of Action alleging "Legal Malpractice–Breach of Fiduciary Duty" by the defendants. As the facts were developed in the course of the Second Motion for Summary Judgment, the court found that there were two specific sets of allegations that arose from the Third Cause of Action. The first was that the defendants had mismanaged money plaintiffs paid to them to cover litigation costs, which the court found was unsupported by any evidence. *Id.* at 20. The second challenged the creation and implementation of the hearing process before Judge Daniels through which the approximately $2.3 million dollars in additional funds (above the averages for amounts awarded in Judge Jenkins Decision, referred to hear as the "Hearing Funds") was distributed. With regard to this allegation, Judge Brian addressed three related claims. First, he concluded that plaintiffs presented no evidence that defendants breached their duty of undivided loyalty to the plaintiffs by allowing parties who had not

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[6] Victoria Rayburn, whose deceased husband Lawrence Rayburn is a plaintiff, filed a *pro se* letter with attachments, dated August 21, 2007, in response to the Third Summary Judgment Motion. It is not apparent that the letter was served on other parties, as it contains no certificate of service and no defendant responded to it. While the letter was articulate and earnest, it dealt principally with issues already resolved in the Second Memorandum Decision and its concealment argument did not raise new issues not otherwise addressed in this decision.

prevailed before Judge Jenkins to participate in the hearing process and receive awards that "took away from the money awarded prevailing steelworkers." *Id.* at 21. Second, the court concluded that Judge Daniels had acted independently in determining awards and distributing the Hearing Funds and that plaintiffs had provided no evidence "to support the claim that Defendants improperly influenced the hearing process." *Id.* Finally, the court concluded that plaintiffs had provided sufficient evidence to raise an issue of material fact as to "whether Defendants breached their fiduciary duty in how they created and implemented the hearing process." *Id.*

This final conclusion must be considered, however, in connection with other rulings in the Second Memorandum Decision, for example, Judge Brian's rejection of plaintiffs' claims in the Fourth Cause of Action ("Legal Malpractice–Negligence") that the defendants, among other things, breached their duties as plaintiffs' counsel by failing to adequately explain the hearing process, failed to adequately advise plaintiffs of the standard of proof and type of evidence that the process would require for a successful claim on the Hearing Funds, failed to give the plaintiffs adequate information to pursue their claims beyond the worksheet and other information provided to each of them, and left the plaintiffs to represent themselves in the hearing process before Judge Daniels. Judge Brian concluded that "the Plaintiffs failed to show the Defendants had a duty to do more than inform them of the hearing process or how the settlement was calculated." Second Memorandum Decision, at 24.

In the Third Summary Judgment Motion, defendants contend that the remaining breach of fiduciary duty claim should be dismissed as a matter of law because plaintiffs have failed to provide proof that any of them were damaged by any alleged fiduciary breach, the four-year statute of limitations applicable to breach of fiduciary duty had passed before plaintiffs filed their complaint, they signed releases barring their claims against defendants, and they are bound by the settlement because it was accepted by a majority of the plaintiff steelworkers. The court addresses the first two

issues, and grants partial summary judgment on the damages issues and summary judgment as to all remaining issues because the complaint was filed after the statute of limitations had expired. Because its rulings on the first two issues are dispositive, the court does not reach the remaining two issue

A. DAMAGES

Under Utah law, an attorney has a fiduciary duty to his clients that requires him "to exercise impeccable honesty, fair dealing, and fidelity" *Kilpatrick v Wiley, Rein & Fielding*, 909 P 2d 1283, 1290 (Utah Ct App 1996) In this regard, the attorney "is not permitted to take advantage of his position or superior knowledge to impose upon the client, nor to conceal facts or law, nor in any way deceive him without being held responsible therefor" *Id*, quoting *Smoot v Lund*, 369 P 2d 933, 936 (Utah 1962) The Utah Court of Appeals has outlined "[t]he essential elements of legal malpractice based on breach of fiduciary duty" to include (1) an attorney-client relationship (2) breach of fiduciary duty to the client, (3) causation, both actual and proximate, and (4) damages suffered by the client" *Id*, *Walter v Stewart*, 2003 UT App 86, ¶17 In *Kilpatrick*, the court noted with regard to causation of damages in breach of fiduciary duty cases, "clients must show that if the attorney had adhered to the ordinary standards of professional conduct and had not breached fiduciary duties, the client would have benefited" *Kirkpatrick*, 909 P 2d at 1292 (emphasis omitted) A natural corollary of this causation requirement is that the client must show that he was in fact damaged by the attorney's breach of duty.

It is defendants' contention that "Plaintiff's claims should be dismissed because Plaintiffs have failed to meet their burden of proving they were damaged by the manner in which the hearing process was created and implemented" *See* Defendants' Memorandum at 17 Plaintiffs respond simply that they are not required to show specific damages "at this stage of the litigation" "Defendants' argument fails to consider that to survive a motion for summary judgment, at this stage

of the litigation, it is Plaintiffs' burden to demonstrate the fact of damage and the causal relationship between Defendants' conduct and damage Both elements of the claim are issues of fact and the court must refuse to 'take the issue from the jury '" Plaintiffs' Memorandum at 16 (citation omitted). The court concludes that, to the extent plaintiffs claim to have been individually damaged, they cannot rest on a general showing that defendants' actions may generally have resulted in damage to them, rather, they must make a specific factual showing as to how each plaintiff was actually damaged

Defendants point out that, after the Second Memorandum Decision narrowed the issues in this case to whether the defendants improperly created and implemented the hearing process, defendants served interrogatories on plaintiffs addressed to this issue *See* Defendants' First Joint Set of Interrogatories and Requests for Production of Documents Plaintiffs responded to the discovery requests on June 29, 2006 *See* Plaintiffs' Joint Responses to Defendants' First Joint Set of Interrogatories and Requests for Production of Document ("Plaintiffs' Interrogatory Responses") The second interrogatory asked plaintiffs to describe specifically how each had been damaged by the claimed breach of duty regarding the hearing process and to identify supporting information Plaintiffs responded with an objection "to the extent it seeks a legal conclusion as to damages and/or requires expert testimony" and deferred factual response on the basis that "[t]he information sought by the foregoing discovery request is the subject of ongoing discovery in this matter " Plaintiffs' Interrogatory Responses, at 7 The answer ended with an oblique reference to the plaintiffs' answer to Interrogatory No 1, which described the plaintiffs' contentions as to how defendants had breached their fiduciary duty regarding the hearing process *Id* at 7 and 3-7

Plaintiffs never supplemented their answer to the damages interrogatory in the year that passed before defendants filed their Third Summary Judgment Motion, did not file a Rule 56(f) motion, they never provided any specific evidence of individual damage claims in their January

2007 response to the summary judgment motion itself, more than five years after the litigation began with the filing of the original complaint in November 2002. Instead, plaintiffs point to the various ways they contend the hearing process–and the funds provided for distribution through that process–fell short of meeting defendants' obligations. For various reasons, most of these allegations are not sufficient to withstand summary judgment, either because they were already rejected in the Second Memorandum Decision or because they are insufficient to support a claim of breach absent a showing that defendants' alleged wrongdoing caused actual damages. The court concludes that some of plaintiffs' claims of damages are based on claims of breach that have already been rejected in prior proceedings, some fail because no resulting damage has been shown by any plaintiff, and some appear to raise questions of fact that preclude summary judgment on substantive grounds. Each type of claim is addressed below.

1. **Claims Already Ruled on in the Second Memorandum Decision.**

Some of the grounds for plaintiffs' damages claims were addressed and rejected by the court in the Second Memorandum Decision. Plaintiffs claim that they were damaged by defendants' failure to deal "with the statistical fact (and resulting conflict) that up to half of those entitled to an award under the Jenkins Decision were entitled to more." Plaintiffs' Memorandum at 17, 23. This is essentially the same claim addressed in the Second Memorandum Decision, i.e., that "Defendants were . . . negligent because damages should never have been calculated based on averages." Second Memorandum Decision, at 22. Judge Brian rejected that claim, concluding that "the Plaintiffs failed to show how their settlement amount was not fair and complete."[7] *Id.* at 24.

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[7] Although these and some other claims were addressed and rejected in connection with claims for relief (such as negligence) other than breach of fiduciary duty, the particular legal theory does not seem to be the controlling basis for the rejection. There is no apparent reason why a claim of, say, failure to provide individual representation, which was rejected as a violation of the standard of care for negligence would find independent legal support in the realm of fiduciary duty, because the breach of duty alleged in each is essentially the same. *See Doe v. Howe*, 626 S.E.2d 25, 33 n.27

Plaintiffs claim that they were damaged by defendants' failure to represent each steelworker in the hearing process; rather, they left the plaintiffs to work through the process, on their own, with an inadequate worksheet and insufficient information to make an effective case at the hearing. Plaintiffs' Memorandum at 17, 19. These claims were also rejected by Judge Brian, who concluded that "the plaintiffs failed to show the Defendants had a duty to do more than inform them of the hearing process or how the settlement was calculated. Without law to show the Defendants had a higher duty this Court will not impose such a duty on the Defendants."[8] Second Memorandum Decision, at 22, 24.

Plaintiffs claim that the hearing process gave steelworkers who did not prevail in the Jenkins Decision (the "LaRoche" plaintiffs and others) awards in the hearing process of "up to an additional $25,000 on top of the $12,000 wrongfully diverted by Defendant Young" in dealing with the settlement proceeds. Plaintiffs' Memorandum at 20. Plaintiffs made essentially the same claim in connection with the Second Summary Judgment Motion: "Plaintiffs claim Defendants breached their duty of undivided loyalty because they had control and sole discretion over the 'extra monies' and that non-prevailing plaintiffs participated in the hearing process and took any money awarded them away from the money awarded prevailing steelworkers. Plaintiffs have not provided any evidence to support these claims." Second Memorandum Decision at 21. The court accordingly granted summary judgment against plaintiffs on that claim and it cannot be raised again here. *Id.*

Finally, this category appears to include plaintiffs' claim that defendants breached their fiduciary duty by sending correspondence to Judge Daniels "directly urging him to pay certain

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(S.C.Ct.App. 1995).

[8] This claim also must involve individualized damages, and is subject to the analysis in the next section of this decision. That is, even if the claim survived, plaintiffs have failed to show that they were individually damaged by defendants' allegedly wrongful actions.

selected steelworkers up to an additional $25,000 for unspecified services rendered in association with the prosecution of the USX Case." Plaintiffs' Memorandum, at 21. This, in essence, is a claims that defendants exerted inappropriate influence over Judge Daniels to make awards to some steelworkers who should not have received them. Judge Brian appears to have already ruled against plaintiffs on this claim, concluding that "Plaintiffs have not provided any evidence to support the claim that Defendants improperly influenced the hearing process. The record shows Judge Daniels was an independent party." Second Memorandum Decision, at 21.

2. **Claims Involving Specific Losses.**

Another category of plaintiffs' claims, by their nature, involve specific losses to specific plaintiffs. Yet plaintiffs have provided no evidence of losses by individual plaintiffs, but only general arguments that such losses must have occurred. For example, plaintiffs argue that certain steelworkers were encouraged to apply for additional funds through the hearing process while others were discouraged from doing so. Some of those so discouraged (including several of the plaintiffs here) nevertheless went on to apply for and receive awards. In this regard, plaintiffs claim that defendants provided inadequate help and information–even erroneous information at times–so that many who may have been eligible, even if not directly counseled not to apply, were wrongly discouraged from applying and lost their chance to receive a deserved award through the hearing process. Plaintiffs' Memorandum at 17-22. Plaintiffs point out that, although according to the law of averages, around half of the 1677 steelworker should have suffered losses above the average on which the payout numbers were calculated,[9] "only 428 of the nearly 1,700 steelworkers (those who were specifically encourage[d] and assisted by Defendants, and those competent enough to calculate their own damages and brave enough to argue their own claims) appeared *pro se* before the hearing

[9] This is a very questionable conclusion based on the very simple numbers relied on, but is taken as true for the limited purposes of this analysis.

officer. More than 85% of those that participated received additional cash from the settlement and the average recovery of those who made a recovery was $6,414.21." *Id.* at 20.

Plaintiffs make no further effort to either identify specific plaintiffs who suffered individual losses in this way nor do they specify the amount of any such losses. Clearly the amount of claims cannot encompass all of the $2.3 million set aside because 438 steelworkers actually participated in the hearing process and most received awards. Nor can all of the plaintiffs claim such individual losses, because a significant number of them actually did receive money through the hearing process: 74 of the approximately 200 plaintiffs received hearings and 69 of those received awards totaling $361,290.23. Young Affidavit at ¶ 5. There is simply no basis for assuming that any particular one of the remaining 130 or so plaintiffs suffered individual damages, other than by the law of averages, an entirely inadequate level of proof at the present stage of proceedings in this case. Plaintiffs have simply failed to provide substantial evidence that any particular plaintiff was injured through any claimed default of fiduciary duty by defendants.

Defendants have produced evidence that they provided the steelworkers with sufficient information for them to determine if they had losses above the average that made it worthwhile to pursue an additional award through the hearing process, and many years have passed since that occurred in 1995 or 1996. *See* Young Affidavit. It is not enough at this point for plaintiffs to provide what amounts to anecdotal evidence that some steelworkers were wrongly or inadequately advised and nevertheless went forward and got awards. *See, e.g.,* Affidavit of Ron Chilton, at ¶ 11; Supplemental Affidavit of Nyle M. Stewart, at ¶ 3. At this stage in the proceedings, it is not sufficient for the plaintiffs to merely allege speculative, aggregate harms to a class of indivduals. Rather, to sustain claims in this category plaintiffs must demonstrate specific harms to individual plaintiffs, who, because of defendants' breach of duty, did not apply for an award and thereby lost

a specific sum that each would have been entitled to had he or she participated in the hearing process.

In support of their Third Summary Judgment Motion, defendants provide evidence that, in 1995 or 1996, in connection with the settlement, each steelworker was provided enough information to calculate specific losses and make a determination of whether–and to what extent–the money they were to be paid from the settlement proceeds fell short of that steelworkers' actual losses. Young Affidavit, at ¶¶ 2-5. Although there is some dispute about whether this form fit the circumstances of every one of the 1677 steelworkers, it certainly applied to most of them (and plaintiffs have identified none of them to whom it did not apply) and its use would have provided enough information to do at least a rough calculation of how their individual losses differed from the average steelworker for their category on which the settlement pay outs were based. In this regard, the defendants provided each of the 1,320 "idling" plaintiffs with a "Hearing Worksheet for Idling Plaintiffs," which detailed the basis on which the average loss for that category had been calculated, with corresponding blanks in which individual information could be put, so as to compare average loss with individual loss.[10] On the other side of that sheet of paper, corresponding blanks were provided for each plaintiff to fill in his own information in order to arrive at a loss calculation for his or her specific circumstances. The sheet then advised that if the individual calculations did not exceed the $26,500 settlement figure, the particular plaintiff "should probably request a hearing" with Judge Daniels, and that those who did not exceed that figure could "still request a hearing if

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[10] This sheet set out in detail how the average settlement amount of that category had been calculated, including the average yearly wage figure used, a fractional multiplier of .53 derived from the average number of days in a year the average idling plaintiff had been off work, the average lost wage derived from applying the multiplier to the average wage, the average deductions from that figure for mitigation in the form of other wages and subsistence payments, with the resulting total gross wage loss, which was then multiplied by a compound interest multiplier of 1.644 (calculated by an economist hired by defendants) to reflect interest for the time from the wage loss to the settlement, resulting in a final figure for "Total Damages," which were $26,500 for idling plaintiffs.

you have special facts of circumstances which may entitle you to additional money from the surplus fund." Young Affidavit at ¶¶ 2, 4 and Exhibit A. A similar worksheet was supplied to the 214 "recall" or laid off steelworkers. *Id.* at ¶2. Defendants state that the few in other categories could have used these same forms to calculate whether and how much more than average they had lost. *Id.*

Plaintiffs refer to these forms disparagingly as "a ½ page work sheet" (Plaintiffs' Memorandum, at 24), but they do not provide anything to materially contradict defendants' evidence that the worksheet was adequate for its purpose at the time or that it (or something equivalent of the plaintiffs' own making) could provide a basis for individual calculations of claimed losses at this point in this case.[11] Instead, plaintiffs rely on anecdotal evidence about some steelworkers who received awards despite defendants' breaches of duty and assert that more discovery is needed. *See, e.g.*, Plaintiffs' Memorandum, at 8, ¶¶ 6-7; *cf.* Plaintiffs' Interrogatory Responses, at 7. This is not

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[11] Plaintiffs also contend that the multipliers for percentage of days idled was an average and did not fit every plaintiff who might have had more time off. In fact, they claim that Judge Daniels used a more favorable multiplier in calculating awards and that they were not advised of this, implying that it would have made a difference in whether some would have sought a hearing who did not. Judge Daniels does appear to have sparingly used a different multiplier when a steelworker presented specific facts showing he would have been called back earlier and would therefore have worked a longer portion of the year. There appear to be very few cases in which Judge Daniels, who seemed to carefully distinguish when he was departing from the norm, actually stated that he used a higher multiplier. One was in the case of Tom Chamberlain, where Judge Daniels explained that he was using a multiplier of .58, rather than the .53 used "for most workers," because Chamberlain showed that he would have worked longer during the year. Hearing Award Memorandum, at 33 (Chamberlain, Tom). Another was Jerry Hansen, where Judge Daniels stated that "[h]is lost time in 1987 was .56 of a year." *Id.* at 6 (Hansen, Jerry). Plaintiffs have identified no plaintiff in this case, who would have been entitled to a similar deviation from the norm; and, as discussed below, they have failed to identify any specific loss to any individual plaintiff associated with this multiplier claim. The calculation of this multiplier for any particular plaintiff appears to require little more than a determination of what fraction of the year each was out of work and comparing that to the .53 year that was used as the average in calculating the settlement payments for each group. Whatever the process may be, plaintiffs have given no reason why individual plaintiffs, by this time, could not have determined whether their individual circumstances justified a higher than average multiplier.

enough. As Judge Brian observed in concluding that plaintiffs had had enough time to come up with specifics to support their claims of misrepresentation by defendants:

> Plaintiffs claim, in essence, that they cannot develop every way in which these statements [that the settlement included everything that Judge Jenkins had awarded] were false until discovery takes place. Time to conduct discovery has expired. * * * Moreover, much of the information Plaintiffs claim they need is within their own possession. Plaintiffs could review Judge Jenkins' decision, determine what damages should be included, and make their own calculations as to what the awards should be. Plaintiffs know what he or she received in the settlement and could compare that to the amount they claim they should have received.

Second Memorandum Decision, at 16. Similarly, in this instance, plaintiffs appear to have access to information necessary to calculate how much each individual claims to have lost as a result of not participating in the hearing process (or by participating without enough information, if that is the claim). The forms defendants provided to them are, at least, a significant start. Yet not one plaintiff has provided this information, either in response to defendants' interrogatories or this Third Motion for Summary Judgment, nor have defendants given any reason why such individual calculations can not be made. Nor did plaintiffs conduct any pertinent discovery during the time this motion was stayed, file any motion under Rule 56(f) to be allowed to conduct further discovery before responding, or even identify any specific information that they did not have for which discovery was needed. Instead, plaintiffs claim, based on a simplistic analysis that relies principally on the approximately $6,400 average award of those who participated in the hearing process and received an award, that "it is reasonable to infer from the facts that the large majority [of the steelworkers] would have received up to an additional $10,000, or at least the average of $6,400," if defendants had properly supported them in the process. Plaintiffs' Memorandum, at 24. The plaintiffs have provided no reasonable basis to apply such an inference in favor of any particular plaintiff in response to a summary judgment motion at this stage of proceedings.

Rather, in order to prevail on their claims that defendants breached a duty by failing to provide them with sufficient information or wrongly discouraging them from seeking further compensation through the hearing process, plaintiffs are required to show that defendants' breach caused each plaintiff specific damage, not merely that it might have resulted in some speculative damage to persons not identified. This plaintiffs have failed to do, and defendants are therefore entitled to summary judgment on all such claims.

3. **Awards Outside the Scope of the Jenkins Decision.**

A third category of claims is not so clear, however. Plaintiffs assert that, at the meeting where the USX settlement was explained, Defendant Young represented that the hearing process would be based on objective criteria rather than the subjective views of the arbitrator: "We will retain an independent judge in Salt Lake City, doesn't know the facts of this case but will have these formulas before him." Plaintiffs' Memorandum, at 21 (citation omitted). Indeed, Judge Daniels' memorandum setting forth his specific awards began with an explanation of the parameters by which he was bound:

> 1. The undersigned hearing officer was appointed to conduct hearings to equitably distribute some of the proceeds of the settlement of this lawsuit. The large majority of the settlement proceeds were distributed to the various classes of plaintiffs on an average basis. The plaintiffs were then invited to request a hearing in order to demonstrate that their particular situation equitably required that they be given a larger settlement than the average plaintiff. A fund was set aside to pay for these equitable claims. I have attempted to approve claims based on the merits of each, without regard to the total amount available. The total of the award does not exceed the equitable fund. * * *
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> 2. Awards were made with certain limitations in mind. Because Judge Jenkins' ruling did not award the plaintiffs all that they were seeking, many, if not all, of the plaintiffs may feel that they have not been fully compensated for their losses. This may be true, but cannot be remedied from the equitable fund. Monies which were not awarded by Judge Jenkins are simply not available to be divided.

Award, Distribution of Special Hearing Fund, *Pickering v. USX*, dated January 24, 1996 (the "Hearing Award Memorandum"), at 1, ¶¶ 1-2. Judge Daniels went on to explain that he had

categorically excluded awards for certain types of injuries because they were beyond the scope of the Jenkins ruling, e g , loss of certain non-transferable seniority or pension benefits, certain family emotional, relational and collateral financial losses, losses related to certain retirement issues, loss of insurance benefits during the lock-out, losses occurring after August 31, 2007, and loss of 1987 vacation pay *Id* at 1-2, ¶¶ 3-7, 8 ("It would not be fair or just to approve an award which was not within Judge Jenkins' Ruling, taking money from another co-worker whose damages were within Judge Jenkins' Ruling ")

Plaintiffs contend, however, that a portion of Judge Daniels' awards were not based upon any objective or formulaic standard, but were solely guided by his own sense of justice and fairness, which, although otherwise admirable, resulted in awards outside the scope of Judge Jenkins' Decision Plaintiffs' Memorandum, at 10-12, 19 Plaintiffs argue that Judge Daniels made awards in a number of categories "ranging from $1,500 to $25,000 without any mathematical basis and without having demonstrated that they were entitled to additional sums based on the worksheet In fact, more than 25 steelworkers received substantial additional sums from the hearing fund simply because they had allegedly provided some unspecified assistance to counsel during the litigation " *Id*

These criticized awards appear to fall into two main categories identified in Judge Daniels' written decision [12] First, Judge Daniels awarded $1,500 each to ten steelworkers to make up for what he considered an "unfair situation" that resulted from Judge Jenkins determination that the steelworkers' losses would be offset by any wages they earned at other jobs while idled but no offset would be required for unemployment benefits received by those who did not find other work (based

[12] The court could find any other such awards that plaintiffs specifically identified, except the additional awards to LaRoche or other non-prevailing steelworkers, which are discussed further below Without such specifics, the court is left to speculate as to any additional awards plaintiffs challenge in this way, a task it cannot undertake

on Judge Jenkins' view that unemployment compensation was a "collateral source" that could not be considered as an offset). Daniels Hearing Memorandum, at 2, ¶ 9. To compensate some workers who worked and were therefore "'punished'" by receiving smaller awards than those who didn't work and collected unemployment, Judge Daniels awarded them $1,500 each, while recognizing the award was not within the scope of the Jenkins Decision. Daniels Hearing Memorandum, at 2, ¶ 9; *see, e.g., id.* at 27 ("Bishop, L.D."–award of $1,500 (Judge Daniels states his view that "it is quite unfair that plaintiffs like Mr. Bishop who worked are penalized for their wages while plaintiffs who collected unemployment were awarded wages during the same period of time" and recognizes, at the same time, that, although unfair, "it is clearly part of Judge Jenkins' order.")). The second category includes other steelworkers who participated significantly in the litigation process, and who Judge Daniels considered to have "sacrificed greatly," giving considerable time and suffering "considerable abuse and harassment by workers who were opposed to the litigation," or who "were responsible for bringing the lawsuit in the first place which benefitted all 2,000 plaintiffs," such as the five who began the suit, the bellwether plaintiffs who participated in a lengthy trial, board members and others who made unusual efforts, he awarded additional amounts up to $25,000. *Id.* at 2-3, ¶ 10; *see, e.g., id.* at 4 (Pickering, Tony, a bellwether plaintiff, awarded $25,000), 15 (Sacco, Ross, awarded $4,000 for "service on the board").[13]

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[13] In addition, plaintiffs claim that, while appearing to recognize that pension losses were not compensable under Judge Jenkins' ruling, Judge Daniels "provided many steelworkers with additional relief for lost pension money." Plaintiffs' Memorandum, at 12, ¶ 18. The sole reference plaintiffs provide for this statement is to page 7 of the Hearing Award Memorandum, without identifying any individual entry. The only relevant entry on that page appears to be that of Ladd Wilkey, who "should have been able to 'creep' into a 70/80 retirement." Hearing Award Memorandum, at 7 (Wilkey, Ladd). The award to Mr. Wilkey appears, however, to be based on his failure to receive "the $400 per month supplement he was entitled to" not on a pension claim, which Judge Daniels appears to have consistently rejected. *See id., cf., e.g., id.*, at 7 (Crook, Curtis), 9 (Carter, Max), 12 (Finch, Shirl), 17 (Burningham, John), 18 (Williamson, John; Hooley, Verl). Judge Daniels stated that he had not made awards based on retirement issues not compensated by Judge Jenkins. *Id.* at 1, Deposition of Scott Daniels, at 56). Plaintiffs have provided no material

The court believes that there is a question of material fact as to whether, under all the circumstances, the defendants breached a duty to the plaintiffs by creating and implementing a hearing process that left Judge Daniels with discretion to make awards that fell outside of the bounds of Judge Jenkins' decision, based only on Judge Daniel's sense of justice and fairness (however well developed and admirable). Defendants appear to have made representations at the settlement meeting that the hearing fund would be used to increase by up to $25,000 the recovery of anyone who lost more than the average and that the money would be distributed based on a formula. Transcript of "Meeting with Clients, Wednesday, June28, 1995, 6:30 p.m., Mountain View High School, Orem, Utah" (the "Settlement Meeting Transcript"), at 41 (". . . [W]e will retain . . . an independent judge in Salt Lake City, doesn't know the facts of this case but will have these formulas before him. * * * He'll have 2.3 million to add to anyone's settlement who lost more than average."). Hearing funds left over after the hearing process ended would then be available to all the plaintiffs to be shared *pro rata*. *See* Settlement Meeting Transcript, at 43-44 (". . . [i]f we don't use up the full $2,500,000, what happens to it. . . . [A]nd the answer is it gets divided back to th group pro rata among each of you."); Hearing Award Memorandum, at 1 ("It is my understanding that excess money in the fund, if any, will be paid to the plaintiffs equally.").

In his deposition, however, Judge Daniels testified with respect to awards to those who had participated significantly in the litigation:

> My original thought was you can only award what Judge Jenkins awarded. Well, obviously, he didn't award that. He didn't award somebody extra because they were a bellwether or something, so that was sort of an exception to that. They were fairly small amounts, so I added those in, and that was entirely discretionary.
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> Essentially Allen [Young] said, listen, I want you to divide this up. I want you to do it fairly and that's all. He said I don't want to have anything to do with it really, and we're not going to question your judgment on it.

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evidence to support their claim that he did.

Deposition of Scott Daniels, at 22. This implies that, at least for some smaller portion of the hearing funds, Judge Daniels was told by the defendants he had discretion to make equitable awards outside of the strict scope of the Jenkins ruling, as opposed to taking it upon himself to do so. Plaintiff, in fact, offer some evidence that defendants encouraged him to do so with regard to certain steelworker plaintiffs who did significant work on the litigation. Plaintiffs' Memorandum, at 21.

Defendants' statements at the time of the settlement, viewed in a light most favorable to plaintiffs' position (as they must be on summary judgment), appear to establish a representation by defendants that Judge Daniels' awards would be limited to amounts within the scope of the Jenkins' decision (or to categories, such as the LaRoche plaintiffs, manager and recalled idling plaintiffs, that were included in the defendants' explanation of the hearing process[14]) and that there would be some reasonable criteria to guide and constrain his decision making. The court concludes that such a representation can carry with it a corresponding fiduciary duty that could be breached if defendants did not provide reasonable, objective standards and, in the absence of such standards, Judge Daniels made awards that fell outside of the scope of the representations defendants made to the plaintiffs

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[14] The plaintiffs all accepted a settlement with USX that included money for the LaRoche plaintiffs, managers and recalled idling plaintiffs, even though they were arguably outside the scope of Judge Jenkins' Decision. Second Memorandum Decision, at 9, 16-17. These categories of plaintiff, although non-prevailing, had the same right to seek up to $25,000 in additional awards through the hearing process with Judge Daniels. This aspect of the settlement was clearly explained to the steelworker plaintiffs before they voted to accept. *See, e.g.,* Settlement Meeting Transcript, at 39, 41, 68, 70. The defendants therefore did not have a duty to limit Judge Daniels' ability to award additional funds to LaRoche or other like plaintiffs who had lost more than average, because that aspect of the hearing process was fully disclosed and accepted by the steelworker plaintiffs. Judge Brian took this into account in his prior ruling against plaintiffs on the fiduciary duty claim. *See* Second Memorandum Decision, at 21 (rejecting plaintiffs' claim of breach based on the allegation "that non-prevailing plaintiffs participated in the hearing process and . . . took away from the money awarded prevailing steelworkers."). It is worth noting that fourteen of the plaintiffs in this case are non-prevailing parties who presented claims to Judge Daniels in the hearing process. Young Affidavit, at ¶ 6.

with regard to the parameters of the hearing process. This further refines Judge Brian's ruling "that Plaintiffs have provided evidence to create a genuine issue of material fact and defeat summary judgment motion on the issue of whether Defendants breached their fiduciary duty in how they created and implemented the hearing process." Second Memorandum Decision, at 21.

The pertinent damages amounts involved, if any, ought to be calculable using the Daniels Hearing Memorandum, and because such damages would include only amounts that would, but for the defendants' breach,. be sums left over in the hearing fund to be distributed *pro rata*, determination of damages does not require calculation based on the individual circumstances of each plaintiff. To be clear, however, because any money that might have been left over from the hearing process would be distributable to all the steelworker plaintiffs, proration would be calculated using the total number of steelworker plaintiffs involved in the USX settlement (about 1677 individuals) as the denominator. Therefore, to the extent plaintiffs in this case were to prevail on this theory, their individual damages would be limited to about 1/1677th of the amount that would have been left over from the hearing fund, had impermissible awards not been made.

4. **Conclusion.**

The court therefore concludes that defendants' motion for summary judgment due to plaintiffs' inability to prove damages should be granted as to any claims already ruled on in the Second Memorandum Decision, as well as to any claims of individualized damages. Summary judgment should be denied, however, as to any *pro rata* portion of monies that plaintiffs prove was awarded to parties not entitled to it as a result of a breach of fiduciary duty by defendants in establishing and communicating parameters that should have guided Judge Daniels' decisions, as more fully discussed above.

B. THE STATUTE OF LIMITATIONS.

A claim of breach of fiduciary duty is subject to a four-year statute of limitations. *Allred v. Allred*, 2008 UT 22, ¶34 and n.24; *Russell/Packard Development, Inc. v. Carson*, 2003 UT App. 316, ¶11, *affirmed on other grounds*, *Russell Packard Development, Inc. v. Carson*, 2005 UT 14. "It is generally accepted that a statute of limitations begins to run upon the occurrence of the last event required to form the elements of the cause of action." *Williams v. Howard*, 970 P.2d 1282, 1284 (Utah 1998). "Furthermore, the mere ignorance of the existence of a cause of action does not prevent the running of the statute of limitations." *Id.* (citations and internal quotation marks omitted).

The plaintiffs' remaining claim is that "the Defendants breached their fiduciary duty in how they created and implemented the hearing process" that was established to distribute the $2.3 million set aside from the settlement for additional awards to deserving steelworkers. Second Memorandum Decision, at 21. The hearing process on began in late 1995 and essentially ended when Judge Daniels issued his written Hearing Award Memorandum on January 24, 1996. Hearing Award Memorandum, at 3. The final payment of the USX settlement proceeds, apparently including the additional awards, was made in March 1996. That final payment appears to be the last event necessary to have completed the chain of breach of duty, causation, and damages "necessary to form the elements" of plaintiffs' breach of fiduciary duty claim. *See, Williams v. Howard*, 970 P.2d 1282, 1284 (Utah 1998) ("It is generally accepted that a statute of limitations begins to run upon the occurrence of the last event required to form the elements of the cause of action" (citations omitted)). The Complaint and Jury Demand (the "Complaint") was filed in this case on November 5, 2002.[15] Because that date is more than four years after the Hearing Award Memorandum and the

[15] The defendants state that "the lawsuit was not filed until July, 2001 . . . ." Defendants' Memorandum, at 21. The files in this matter (which have now reached fourteen volumes) start with

final payment, the undisputed facts regarding the timing of the hearing and the final payment under the settlement agreement raises a statute of limitations issue. To avoid the presumption that their claims of breach of fiduciary duty regarding the hearing process are therefore barred, plaintiffs contend that the discovery rule exception to the statute of limitations is applicable here. Because "*[t]he discovery rule functions as an exception to the normal application of the a statute of limitation*" (*Williams*, 970 P.2d at 1284 (emphasis in the original)), it is plaintiffs' burden to show that there are at least disputes of material fact as to whether the exception applies to their breach of fiduciary duty claim.

In *Russell Packard Development*, the Utah Supreme Court took the opportunity to consolidate and clarify what had previously been a somewhat unclear, and consequently, inconsistently applied standard for the discovery rule. Under this newly-refined statement of the law, there are two classes of cases in which a discovery rule applies. A "statutory discovery rule" applies to cases where by definition a cause of action does not accrue until it is discovered by the plaintiff. *Russell Packard Development*, 2005 UT 14, at ¶21 (using the example of a "three-year statute of limitations for claims based upon fraud or mistake, which provides that a cause of action will not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake"). The "equitable discovery rule" applies in the second class of cases where the statute of limitations contains no internal discovery rule, but certain conditions are present which call for the tolling of the statute of limitations on an equitable basis. *Id.* at ¶24. In this case, because the

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the Complaint, dated October 31, 2002, but bearing a filing date stamp of November 5, 2002. This case has had a complicated procedural history, and the court is therefore cautious about drawing the obvious conclusion that it began on November 5, 2007, as the filings and docket entries indicate, but the court's decision would not be different if the case were to have been filed in July 2001, as the four-year statute of limitations would also have passed by then.

remaining claim implicates no statutory discovery rule, the equitable discovery rule is the only potentially applicable exception to the statute of limitations.

The equitable discovery rule applies in two circumstances: "(1) where a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct, and (2) where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action." *Russell Packard Development*, 2005 UT 14, at ¶25. Plaintiffs loosely argue that in this case both of these circumstances exist, i.e. that the defendants concealed the plaintiffs' cause of action by misleading conduct, and also that exceptional circumstances exist warranting the application of the discovery rule. *See* Plaintiffs' Memorandum, at 26-27. The court addresses each of these arguments.

It is a prerequisite to application of the discovery exception that the plaintiff show that he has exercised reasonable diligence. "Before a period of limitations may be tolled under either of these versions of the discovery rule, an initial showing must be made that the plaintiff did not know and could not reasonably have discovered the facts underlying the cause of action in time to commence an action within that period." *Walker Drug Co. v. La Sal Oil Co.*, 902 P.2d 1229, 1231 (Utah 1995); *see Allred*, 2008 UT 22, at ¶36. .

1. **Concealment**.

In order to successfully support an argument for application of the discovery rule based upon fraudulent concealment, Plaintiffs must to show that "a plaintiff did not become aware of the cause of action [after it accrued] because of defendant's concealment or misleading conduct." *Russell Packard Development*, 2005 UT 14, at ¶25. In this regard, "the concealment version of the discovery rule does not *automatically* operate to toll the limitations period until the plaintiff's actual or constructive discovery of his or her claim." *Id.* at ¶26 (emphasis added).

> Rather, the rule requires an evaluation of the reasonableness of a plaintiff's conduct in light of the defendant's fraudulent or misleading conduct. This is because invocation of the rule 'is essentially a claim of equitable estoppel, whereby a defendant who causes a delay in the bringing of a cause of action is estopped from relying on the statute of limitations as a defense to the action.' Given the rule's genesis in estoppel, application of the concealment version of the discovery rule requires a demonstration that the party seeking to exercise the rule has acted in a reasonable and diligent manner. In order to meet this reasonableness standard, a plaintiff must demonstrate that, 'given the defendant's actions, a reasonable plaintiff would not have brought suit within the statutory period.'

Id. at ¶26 (citations omitted).

In this case, the plaintiffs have failed to identify any facts that were concealed by defendants' conduct which prevented "a reasonable plaintiff" from filing this action prior to the running of the statute of limitations. Rather, plaintiffs the undisputed facts show that plaintiffs had sufficient information on each aspect of their fiduciary duty claim regarding the hearing process to be able to file within the required limitations period.

Plaintiffs have asserted that they, "collectively an undereducated group of skilled and unskilled laborers, many of whom were unable to read effectively" (Plaintiffs' Memorandum, at 26), were damaged because non-prevailing parties were included among those who could receive awards through the hearing process, there was not enough money set aside for the hearing process to compensate those who would reasonably have claims for additional awards based on above-average losses, insufficient information was given to the steelworkers to allow them to determine whether their particular circumstances made it worthwhile to seek an additional award, short shrift was given to them when they asked advice or were advised by paralegals or attorneys before the hearing process, some were wrongfully discouraged from pursuing additional funds (some of whom applied anyway and received awards), and all were left to pursue any hearing award on their own without

representation. All these acts allegedly resulted in individual losses in as-yet unspecified amounts.[16] With regard to the hearing process itself, plaintiffs claim that Judge Daniels gave awards outside the bounds of Judge Jenkins' decision, was not appropriately constrained in or guided in the scope of his awards by formulas or instructions that should have been provided by defendants, and that defendants secretly urged Judge Daniels to make beyond-the-scope awards to favored steelworkers.[17]

The plaintiffs have produced no evidence, however, that they did not have sufficient information to put them on reasonable notice of the claims they now assert within the period of the statute of limitations.

With regard to individual damages that might have been suffered by particular steelworkers, defendants have shown that the plaintiffs had, or had access to, considerable information since 1996, that could have been used to determine, at a minimum, whether they fell within the class of steelworkers whose losses were greater than average and therefore may have suffered losses because of failure to seek additional compensation through the hearing process. The plaintiffs were informed that the core settlement payouts were based on averages at the 1995 settlement meeting. Defendants' Memorandum, Statement of Undisputed Material Facts ("Undisputed Facts"), at ¶ 8.

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[16] The court has already dismissed most of these claims in the damages section, but is taking a broader approach to the statute of limitations issue, as defendants have presented it as an alternative basis for summary judgment.

[17] In responding to defendants' statute of limitations arguments, plaintiffs set forth only three specific examples of concealment or misleading statements by defendants: "Defendant Young (i) told prevailing parties under the Jenkins' Decision that they had no claim to the roughly $1.6 Million (the so called 'surplus') which was diverted to no prevailing parties, and (ii) told non-prevailing parties that they had a right to petition for up to $25,000 more via the appeals procedure and (iii) failed to instruct Scott Daniels not to award additional monies to non-prevailing parties." Plaintiffs' Memorandum, at 27. The court, however, has taken into account other types of claims set out in other parts of their Memorandum, as those claims might also bear on the question of whether plaintiffs' fiduciary duty claims are barred by the running of the limitations period.

In addition, each was given a chart showing the "total Gross Payment by Group" which set out the payments that would be made to each category of steelworker. *Id.* The "Hearing Worksheet for Idling Plaintiffs,"which was a category that included most of the steelworkers, was passed out at the June 2005 meeting and at later meetings; that worksheet showed how the average damages were calculated and it was explained by counsel. *Id.*. They were told at the meeting that any who believed that they had lost more than the average could request a hearing before an independent judge who would have about $2.3 million dollars to make additional awards. *Id.* at ¶ 9. At later meetings, along with the "Idling Plaintiffs" worksheet, "recall plaintiffs" were also given a separate worksheet giving settlement calculations for their category, which could be used to determine whether their individual losses exceeded the average and a hearing was therefore warranted. Young Affidavit, at ¶ 2. Theses worksheets could be used by plaintiffs of other categories of plaintiffs, as well. *Id.* At some time during the process, as well, "all but a few steelworkers were given a "settlement summary" showing their individual payout. *See* Second Memorandum Decision, at 11, 26. A number of the plaintiffs in this case actually participated in the hearing process (some of those saying that they did so despite being discouraged from doing so by defendants), most of whom received awards. *Id.* at ¶ 5.

Defendants contend that, with this information, plaintiffs had the means to calculate whether or not their actual losses were higher than the average on which the settlement payouts were based and they were therefore eligible for an award. Plaintiffs provide certain affidavits from steelworkers who testify that they were simply told by a defendant or paralegal that they didn't have enough losses to warrant going to a hearing, but that they ended up going anyway and received an award. *See, e.g.*, Affidavit of Ron Chilton, at ¶ 11; Supplemental Affidavit of Nyle M. Stewart, at ¶ 3; Supplemental Affidavit of Ronald L. Carson, at ¶¶ 3-5. Some testify that they did not seek a hearing because defendants refused to represent them and they were too intimidated by the process to go

through with it on their own. *See, e.g.*, Steelworker Affidavit, Dwayne Rawlings, at ¶ 9. A few others say they were told by defendants that they did not have enough losses to warrant paying the $100 for the hearing and they relied on this and didn't seek a hearing (although not saying whether they later found that this advice was false). *See, e.g.*, Affidavit of David L. Glazier, at ¶ 7. Plaintiffs have pointed to no evidence, however, that the individual plaintiffs did not actually have enough information to actually make the necessary calculation, and none of the affidavits referred to appear to say that. The fact that a number of them ultimately obtained awards despite being given faulty advice strongly implies that they had the information available to show Judge Daniels that they suffered losses above average and therefore had enough information at that point–in 1995 or 1996–to discover whether they suffered a loss because of defendants' alleged breach of duty.

Plaintiffs appear to claim that because some plaintiffs were given faulty information on which they relied in not seeking a hearing, this amounts to concealment by defendants. But a plaintiff cannot simply stand by forever without taking reasonable steps to find out if they have a claim, especially when the information needed to determine whether a loss was suffered is at hand. No plaintiff has presented evidence that, during the four-year limitations period, he or she could not have made at least a rough calculation as to whether an award was available if a hearing been sought. Each plaintiff who did not receive an award knew it once the hearing process ended in 1996. Plaintiffs also must have known what information that defendants had provided to them in advance of the hearing process, whether, at the time, they had understood how to use that information to determine their eligibility for an additional award, and that they had not been represented by defendants in the hearing process. Plaintiffs fiduciary duty claims clearly arose no later than March 1996, and plaintiffs themselves appear to have had sufficient information available to them at that time to know that, had they taken the time to plug in the numbers, calculate (even roughly) their own losses and compare them to the average for their category so as to determine whether they had lost

anything by failing to seek a hearing or within the hearing process itself. Adding this information to the facts that they already knew about how they had been treated by defendants, the potential for a claim against the defendants would not be hidden. No plaintiff has provided evidence that this assessment could not be done during the ensuing four years because of something the defendants said or did to them. It is also apparent that there was considerable unrest among the steelworkers about the settlement itself and the hearing process and that they talked to each other about concern over how they had been treated. *See, e.g.*, Glazier Affidavit; Stewart Supplemental Affidavit; Bingham Affidavit.

As discussed above, in order to be entitled to the discovery exception, a plaintiff must show that he "did not know and could not reasonably have discovered the facts underlying the cause of action in time to commence an action within" the limitations period and that "given the defendant's actions, a reasonable plaintiff would not have brought suit within the statutory period." Given the information available to them at the time, plaintiffs have failed to show that any action by defendants that they claim misled them would have prevented a reasonably diligent plaintiff from discovering that they had been wronged by defendants in the way the plaintiffs now claim.[18] A plaintiff cannot

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[18] Moreover, plaintiffs' claim that they must have suffered individual damages is based on the "statistical fact . . . that up to half of those entitled to an award under the Jenkins Decision were entitled to more," because the core settlement amounts were based on average losses. *See* Plaintiffs' Memorandum at 17, 23. This conclusion is not based on an expert analysis of hidden or otherwise concealed numbers, but on what plaintiffs appear to posit as a self-evident truth based on the fact that individual payouts from the settlement were based on averages. Further, plaintiffs argue that, because of this, "one-half of the total USX plaintiffs (approximately 838) received less than that average and, therefore, had legitimate reasons to seek additional awards" and that such awards would average "approximately $2,743.00 . . . ." *Id.* at 23. At the time the Hearing Award Memorandum was issued, it was clear that far fewer than 838 steelworkers had received awards. Thus, based on plaintiffs' own reasoning, there was enough information available on the basis of mathematical averages to suggest to a that the award fund was insufficient and that individuals who did not apply would have been eligible for additional money. While the court does not necessarily agree that this reasoning is sufficient to establish that any particular plaintiff suffered losses, as plaintiffs try to use it, it does suggest that additional inquiry may have been warranted.

stand by and fail to take reasonable steps to determine whether he has been injured by a defendant's actions. Plaintiffs have therefore failed to bear their burden required by the concealment exception to show that a reasonably diligent plaintiff, under these circumstances, would not have been able to file a claim for individual damages during the limitations period.

With regard to plaintiffs' other claims about the hearing process that involve *pro rata* losses, the only claims remaining in the case after the court's preceding damages analysis, the conclusion must be the same. In January, 1996, before the final payment on the USX settlement, Judge Daniels issued a Hearing Award Memorandum in which he detailed all the awards he had made and set out in narrative form his understanding of his task and the principles on which he based his awards, along with an explanation of the basis on which he made individual awards that did not "involve only an arithmetic computation." *See* Hearing Award Memorandum at 3, ¶ 11. At that point information was available to plaintiffs, in writing, that Judge Daniels had made awards to a number of specific steelworkers outside the scope of Judge Jenkins' ruling. Plaintiffs already knew what defendants had represented to them about the purposes of the Hearing Fund and how those funds would be distributed. They therefore could have determined, with little apparent effort, whether the awards by Judge Daniels corresponded to or departed from what defendants had told them. Plaintiffs have failed to show any material facts supporting a concealment exception with regard to their claim that defendants' were responsible for inappropriate awards outside the scope of Judge Jenkins' decision.[19]

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[19] This conclusion does not change, even accepting as true plaintiffs' contention that defendants sent a letter or letters to Judge Daniels, of which plaintiffs were not aware, encouraging him to make awards to undeserving steelworkers. A late discovery of such correspondence, even if outside the limitations period, is not significant, because the fact that such awards were made was obvious from the Hearing Award Memorandum, and, under plaintiffs' theory, such awards were a result of defendants' breach of duty simply because they resulted from a lack of appropriate guidelines to constrain the scope of the awards. No secret exercise of influence was required to establish the elements of liability, and late discovery of letters to Judge Daniels urging certain out-

The same conclusion applies to plaintiffs' claims that inappropriate awards were made to non-prevailing parties, such as LaRoche plaintiffs. Judge Jenkins' decision clearly identified which categories of plaintiffs were entitled to damage awards, and those the plaintiffs no complain about were among those identified. As discussed above, defendants told the steelworkers at the June 1995 meeting that such non-prevailing plaintiffs were eligible and could apply for such awards. The Hearing Awards Memorandum itself identified a number of such steelworkers who were given additional awards. *See, e.g.* Hearing Award Memorandum, at 8 (Larson, Gary, a LaRoche plaintiff), 13 (Jensen, Wayne; Remund, Dwayne (recalled idling plaintiffs)). Thus, the information required to discern a claim on the basis that defendants' authorized awards to non-prevailing steelworkers was available to plaintiffs at the time of the final settlement payment in 1996, and they have failed to raise any issue of material fact as to why a reasonable plaintiff would not have discovered this during the limitations period due to any concealment by defendants.

Moreover, the calculation of about $1.6 million that plaintiffs now advance as the amount that should have been left over from the hearing fund for *pro rata* distribution appears to have been based on a calculation from the face of the Hearing Award Memorandum itself, so the information on which plaintiffs base that damages claim was available long before the limitations period had run. *See* Plaintiffs' Memorandum, at 17.

The court has tried to locate in the materials generally referenced by plaintiffs in support of their position on this issue something that accomplishes that task. The only other evidence found that seems related to their statute of limitations arguments appears to be information in plaintiff Chilton's affidavit in which he describes a meeting with attorney Haskins in 2001 where he told Haskins all his concerns about the June 1995 settlement meeting, the written materials on the

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of-scope awards is therefore not material to the statute of limitations analysis.

settlement and litigation costs provided by the defendants, the hearing process with Judge Daniels and what occurred (with no description of the facts) at a 2001 trial where Young had been sued by another steelworker for a finder's fee. Affidavit of Ron Chilton, at ¶12. Chilton stated that he did not know until that point the duties lawyers had to account for settlement funds. *Id.* at ¶¶ 12-13. It is telling, however, that he does not claim that he did not have until then all the factual information necessary to determine whether he had claims against defendants. In fact, he says that based on the information that Chilton gave Haskins at the time, the attorney "put together a complaint for us based upon what we told him about how our lawyers did things from 1987 through 1996." *Id.* at ¶ 12.

Chilton does not say when he first discovered this information or under what circumstances. Nevertheless, the facts Chilton describes as having caused him concern and which he provided to attorney Haskins appear to be things that he knew or had access to in by 1996. For example, he states that after meeting with the lawyers, he "started picking up things from the old documents," such as the fact that $1.6 million had been distributed to non-prevailing steelworkers. *Id.* at ¶ 13. As discussed above, that specific information was knowable and known to plaintiffs long before 2001, from statements made by defendants at the June 1995 meeting, from documents they received after that, and from the Hearing Award Memorandum itself. Further, Chilton testifies extensively about how agitated and concerned he was at specific actions of the defendants at the time they occurred during 1995 and 1996. He states, for example, that he was so angry at the misleading information he received from defendants that he "went for a hearing" with Judge Daniels–even though defendants refused to represent him–and received an award. *Id.* at ¶ 12. None of the facts described by Chilton are shown to have been concealed by defendants and otherwise unknown or not discoverable with reasonable diligence; rather, the undisputed evidence, including his own testimony, is to the contrary. Unless a plaintiff shows fraudulent concealment of necessary facts not

otherwise reasonably discoverable, "mere ignorance of the existence of a cause of action does not prevent the running of the statute of limitations." *Williams*, 970 P.2d at 1284 (Utah 1998) (citations and internal quotation marks omitted).

The undisputed facts show that plaintiffs were in possession of sufficient facts to give them notice of their damages when they received their final settlement checks–the point at which their cause of action accrued; and they had sufficient information to attribute such damages to breaches of duty by defendants at the same time. While a determination whether a discovery exception is applicable is usually "highly fact-dependent" and precludes summary judgment "in all but the clearest of cases" (*In the matter of the Malualani B. Hoopiiaina Trusts v. Hoopiiaina*, 2005 UT App. 272, ¶¶23-24), plaintiffs here have not provided any evidence that actions of the defendants prevented the discovery of the plaintiffs' cause of action. Similarly, the plaintiffs have not shown that they did not know and could not reasonably have discovered and filed their claims against the defendants within the statutory period. *See Russell Packard Development*, 2005 UT 14, at ¶26).

The exception to the statute of limitation they seek to employ is a *discovery* rule; it requires those who seek its protection to show that certain evidence necessary to establish one or more of the elements of their claim for relief was concealed from them, and that reasonably diligent plaintiffs in their circumstances would not have discovered such evidence until too late to file a claim within the statute of limitations period, given the defendants' actions. *See Allred*, 2008 UT 22, at ¶36 (for the discovery exception to apply, plaintiffs must first show that they "did not know and could not reasonably have discovered the facts underlying the cause of action in time to commence an action within [the limitations period]" (citation and internal quotation marks omitted)). Yet plaintiffs have not identified any pertinent material evidence that was discovered only after the passage of the limitations period and that could not have been discovered earlier with the use of reasonable diligence. Even where fraudulent concealment is alleged, summary judgment is appropriate where

"the facts underlying the allegation of fraudulent concealment are so tenuous, vague, or insufficiently established that . . . the claim fails as a matter of law." *Russell Packard Development*, 2005 UT 14, at ¶39. Such is the case here.

The court concludes that, even viewing the facts in the light most favorable to plaintiffs, either before or during the limitations period, they had sufficient information that, had they "acted in a reasonable and diligent manner," they could timely have filed their case. The court further concludes that plaintiffs have not born the burden of establishing a question of material fact as to the application of either the concealment prong or the exceptional circumstances prong of the discovery exception to the statute of limitations. Plaintiffs did not file suit within the four-year limitations period, and they have failed to show that "given the defendant[s'] actions, a reasonable plaintiff would not have brought suit within the statutory period." *See Russell Packard Development*, 2005 UT 14, at ¶26.

2. **Exceptional Circumstances.**

The exceptional circumstances prong of the discovery rule does not require a showing of concealment. "Under this doctrine, the limitations period is tolled where there are exceptional circumstances such that the application of the general rule would be irrational or unjust, regardless of any showing that the defendant . . . prevented the discovery of the cause of action." *Allred*, 2008 UT 22, at ¶36 (citations and internal quotation marks omitted); *Williams*, 970 P.2d at 1285.

The special circumstances plaintiffs appear to assert implicate their status as a "collectively . . . undereducated group of skilled and unskilled laborers, many of whom were unable to read effectively," who, as laymen, "depended entirely on Defendants, as their legal counsel, for advice and information about the nature and extent of their rights and entitlements regarding the settlement proceed[s]." Plaintiff's Memorandum, at 26. In this regard, plaintiffs assert that they could not be expected to have discerned problems with defendants' "dissemination of work history and other

information," have "ascertained the existence of actual and legal injury, or have known about "professional standards and practices among attorneys when accounting for and distributing settlement funds" or "their legal right to demand a fair and principled distribution of settlement funds, base on their individual circumstances." Plaintiffs' Memorandum, at 26.

Like the concealment prong of the discovery exception, however, "[f]or this exception to apply, an initial showing must be made that the plaintiff did not know and could not reasonably have discovered the facts underlying the cause of action in time to commence an action within [the limitations period]." *Allred*, 2008 UT 22, at ¶36 (citations and internal quotation marks omitted). As discussed above, plaintiffs have failed to make this initial showing.

3. **Conclusion.**

Finally, plaintiffs have presented no evidence pointing to any particular "discovery," occurring after the passage of the statutory period, when knowledge of a recently discovered fact completed the puzzle and thereby allowed a plaintiff at some identifiable point to realize that defendants had wronged him or her, a realization that had not reasonably been possible at an earlier time due to concealment or exceptional circumstances. This complete failure to identify a particular event or moment when they finally discovered facts indicating that defendants had breached a duty in setting up the hearing process makes it impossible to discern the point in time that the plaintiffs claim that the statute of limitations should have begun to run, if not at the time the Hearing Award Decision was issued or the final settlement checks distributed.

Like the plaintiff in *Williams*, plaintiffs here do not "offer a reasonable explanation as to why [they]–either pro se or with assistance of legal counsel–could not have filed an action against [the defendants] at some time between" March 1996 and March 2000. *Williams*, 970 P.2d at 1286. Without such a showing, plaintiffs have failed to present a viable case for application of either the

concealment or the exceptional circumstances prongs of the discovery exception to the statute of limitations even in the otherwise favorable context of a motion for summary judgment.

The court therefore concludes that defendants have failed to raise a question of material fact implicating the discovery exception that would preclude summary judgment in defendants' favor on their statute of limitations defense.[20] The final claim remaining in this case should therefore be dismissed.

CHILTON AND GLAZIER MOTION FOR A NEW TRIAL

Plaintiffs Chilton and Glazier, *pro se*, filed a Motion for New Trial, a Memorandum in Support of Motion for New Trial (the "Chilton Memorandum"), and a Verification Affidavit of Motion for New Trial (purporting to verify all statements of fact in the Memorandum) on September 4, 2007. Defendants responded with Defendants' Joint Objection to "Motion for New Trial," filed on September 10, 2007. Plaintiffs then filed Plaintiffs' Reply to Defendants' Objection to Plaintiffs' Motion for New Trial and Concurrent Motion to Wave [Sic] Defendants' Response for Lack of Grounds ("Plaintiffs' Reply") on September 17, 2007.

These plaintiffs seek a "new trial" on the vacation pay issue on which summary judgment was granted against them in the First Memorandum Decision. *See* Chiton Memorandum, at 20-25 to 22-25. While they purport to bring their motion under Rule 59(a), that rule requires that a motion for a new trial "be served not later than 10 days after the entry of the judgment." Ut. R.Civ.P., Rule 59(b). The First Memorandum Decision was entered on September 22, 2005, and even if it was a

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[20] Plaintiffs argued for a similar discovery exception in connection with defendants' earlier motion to dismiss their accounting claim in their Fifth Cause of Action on the basis that the limitations period had passed: "Plaintiffs claim the discovery rule applies to toll the running of the statute of limitations because Defendants' concealment or misleading conduct stopped plaintiff from becoming aware of the cause of action and exceptional circumstances exist which make application of the general rule irrational or unjust." Second Memorandum Decision, at 25. Judge Brian rejected that broader claim for reasons similar to the court's here. *Id.* at 25-26.

"judgment" as to which a motion for a new trial could be filed, the time for such a motion has long since passed. Therefore, to the extent plaintiffs' motion is a motion for a new trial, it must be denied as untimely.

What the Motion for New Trial really appears to be is another motion to reconsider Judge Brian's grant of summary judgment in the First Memorandum Decision on the vacation pay issue. The arguments presented, however, appear to be a rehashing of arguments that these plaintiffs and the HJS plaintiffs made at length and in great detail in connection with their respective motions for reconsideration that the court struck in its Memorandum Decision (Motions to Strike Plaintiffs' Motions for Reconsideration), dated June 6, 2007 (the "Reconsideration Decision"). The only argument that appears to be new is the claim of newly discovered evidence, only one example of which is actually identified. That evidence, i.e., that defendant Young used a multiplier of .53 for the portion of a year for which the steelworkers were to be reimbursed rather than .58, the multiplier used in Judge Jenkins' decision. Chilton Memorandum, at 15-25 to 16-25. Defendants' use of a .53 multiplier has been known since 1995, and Judge Jenkins Decision, from which plaintiffs extract a page, has been available since May 1995. Thus, even if the point were valid–a point that is not really established by the excerpt from the decision plaintiffs' cite–it is not based on new evidence, and plaintiffs have not explained why it could not have been raised earlier. Plaintiffs identify no other specific item of evidence that they claim is new.

The court explained at length its decision not to consider plaintiffs' previous motions for reconsideration of the vacation pay issue in the Reconsideration Decision. Plaintiffs are not entitled to a "new trial" and have presented no reason for taking up the issue again, whether on the basis of newly-discovered evidence or otherwise. Defendants' Objection asks the court to relieve them from any requirement to respond to the Motion for New Trial, and the court GRANTS that request.

Further briefing on an issue already thoroughly addressed by the parties and the court would be burdensome to both.

Finally, these plaintiffs appear to seek relief on the grounds that their previous counsel has abandoned them and allege that their counsel may, in fact, have been working against plaintiffs' interests and in support of defendants'. Plaintiffs' Reply, at 2-5. The record in this case indicates that plaintiffs Chilton and Glazier had a falling out with their counsel and it is unclear whether they or counsel terminated the relationship. They have participated actively in the litigation ever since. Other self-represented plaintiffs apparently chose to end their representation by HJS. However the relationship with counsel ended, these plaintiffs have provided no basis for starting this case over again at this stage of proceedings. Finally, they have provided no evidence whatsoever to support their allegation of deliberate betrayal by prior counsel. This case has proceeded to final judgment in favor of the defendants over a period of years; the defendants cannot be made to bear the burden of plaintiffs grievances about their representation by counsel of their own choosing.

For the reasons stated above, the court concludes that the Motion for New Trial is without merit and should be denied.

CHILTON AND GLAZIER OBJECTION
TO THE COURT'S DENIAL OF THE MOTION FOR RECONSIDERATION

On September 17, 2007, the date of the hearing, plaintiffs Chilton and Glazier filed an Objection of Plaintiffs on Denial of Motion for Reconsideration on the Vacation Pay Issue and Concurrent Motion for Court to Reverse and Correct Is Judicial Errors (the "Chilton Reconsideration Motion"), accompanied by the Memorandum in Support of Objection of Plaintiffs on Denial of Motion for Reconsideration on the Vacation Pay Issue and Concurrent Motion for Court to Reverse and Correct Is Judicial Errors (the "Chilton Reconsideration Memorandum"). Defendants responded with Defendants' Joint Objection to pro se Plaintiffs Chilton and Glazier's: "Objection of Plaintiffs

on Denial of Motion for Reconsideration on the Vacation Pay Issue and Concurrent Motion for Court to Reverse and Correct Is Judicial Errors" ("Defendants' Second Objection"), filed on September 20, 2007. Thereafter, plaintiffs Chilton and Glazier filed Plaintiffs' Reply to Defendants' Response to "Objection of Plaintiffs on Denial of Motion for Reconsideration on the Vacation Pay Issue and Concurrent Motion for Court to Reverse and Correct Is Judicial Errors" on September 28, 2007.

What this motion really appears to be is another attempt by plaintiffs, like their Motion for New Trial, to have the court reconsider Judge Brian's grant of summary judgment on the vacation pay issue, coupled with a request that the court reconsider its own Reconsideration Decision. As was the case with the Motion for New Trial, plaintiffs simply rehash the arguments they and the HJS plaintiffs made in great detail in connection with their respective motions for reconsideration that the court struck in the Reconsideration Decision, while including, as well, a lengthy sur-response to the defendants' Reply Memorandum submitted on June 30, 2005, in support of their First Summary Judgment Motion, which resulted in the First Memorandum Decision. These issues have been addressed by the parties and the court repeatedly, and plaintiffs have presented no basis for revisiting them yet again.

Defendants' Second Objection asks the court to relieve them from any requirement to respond to the Chilton Reconsideration Motion, and the court GRANTS that request. As with the Motion for New Trial, further briefing on an issue already thoroughly addressed by the parties and the court would be burdensome to both.

For the reasons stated above, in connection with these plaintiffs' Motion for New Trial, the court concludes that the Chilton Reconsideration Motion is without merit and should be denied.

In addition, on its own motion, the court STRIKES the Chilton Reconsideration Memorandum because it contains language that is impertinent and scandalous. *See* Ut.R.Civ.P.,

Rule 12(f). The first few pages of the Memorandum contain several instances of intemperate language directed at counsel for defendants. *See* Chilton Reconsideration Memorandum, at 2-15to 5-15 (e.g, referring to counsels' "incompetence or deception;" after using the word "Duhhh," suggesting that the defendants have been hit with too many golf balls; asking the court to take "judicial notice" that the defendants "are either dishonest or stupid," and so on). Any further filings that contain language of that nature will be stricken, and any requests or motions associated with those filings will not be considered by the court.[21]

ORDER

It is therefore hereby ORDERED, as follows:

1. The Joint Motion of Defendants for Summary Judgment on Plaintiffs' Remaining Breach of Fiduciary Duty Claim, referred to above as the Third Summary Judgment Motion, is GRANTED.

2. The Motion for New Trial, filed by plaintiffs Chilton and Glazier, is DENIED.

3. The Objection of Plaintiffs on Denial of Motion for Reconsideration on the Vacation Pay Issue and Concurrent Motion for Court to Reverse and Correct Is Judicial Errors, filed by plaintiffs Chilton and Glazier and referred to above as the Chilton Reconsideration Motion, is DENIED.

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[21] While it is clear that he is not legally trained, Mr. Chilton has been tireless and focused in advancing his views and interests since he began representing himself. Although not concise or tightly organized, his written submissions have included some capable argument (perhaps too often repeated, however); and, while colorful at times, his language has been within acceptable bounds; his oral presentations, while vigorous, have been generally to the point. Mr. Glazier has generally followed in Mr. Chilton's footsteps or simply joined with him and has also contributed briefly at hearings. Both are clearly passionate about their positions, but they have up to this point been relatively respectful to the court and to counsel. The Chilton Reconsideration Memorandum is an unfortunate and disappointing deviation from their prior conduct that the court anticipates will not be repeated.

4. The court has made rulings on certain related motions and objections in the body of this decision, which are REAFFIRMED here as earlier stated.

5. All other outstanding motion not specifically addressed in this memorandum decision are DENIED.

6. This memorandum decision is the final order of the court on the matters referenced herein. No further Order is required, except as addressed in the following paragraph.

7. The court believes that this decision resolves all remaining claims for relief as to all remaining plaintiffs in this case, and defendants are therefore to provide a proposed final judgment for the court's signature.

DATED this 15th day of March, 2008.

BY THE COURT:

Stephen L. Roth
DISTRICT JUDGE

Appendix E

YOUNG & KESTER

ATTORNEYS AT LAW
101 East 200 South
Springville, UT 84663
(801) 489-3294
fax (801) 489-3298

Allen K. Young
Randy S. Kester
Michael J. Petro
Troy K. Fitzgerald
Gary J. Anderson
Scott P. Card

June 21, 1995

Dear Friends:

As we have advised you, USX has made an offer to settle this matter. We have been offered a sum that we believe pays more than the full value of Judge Jenkins' recent decision. The amount offered is forty seven million dollars cash and additional individual pension benefits which add many millions more to the total value of the settlement. The cash portion will be made in two installments.

Enclosed with this letter is a basic outline of the amount each of you will receive in cash under the Settlement Agreement. The amounts listed reflect gross dollars, before attorneys fees and taxes are deducted. In addition to the damages identified on the chart each plaintiff will recieve all cost monies paid prior to June 15, 1995. We will explain the entire settlement proposal to you in detail on Wednesday, June 28, 1995, at the Mountain View High School at 6:30 p.m. We will also explain in detail how the damage calculations were made for each group consistent with Judge Jenkins decision. Assuming that we can work out some technical details with USX, we will be asking you to vote to accept the offer at that time.

There will be a Hearing procedure and cash reserve fund set up for any plaintiff who thinks his facts or circumstances justify a greater settlement number than is reflected on the enclosed chart. The settlement numbers enclosed are the numbers before the one third attorneys' fee or any taxes you may be obligated to pay have been deducted.

Please come to the meeting on Wednesday, June 28, 1995 at 6:30 p.m. at the Mountain View High School with any questions you may have.

Very truly yours,

Allen K. Young

AKY/ph

000761

Total Gross Payout by Group

Everyone will be repaid up to $1,100.00 based upon what costs each plaintiff paid in addition to the payments listed below.

Plaintiff Groups All payments are before taxes and attorney's fees	**1st Payment** Aug/Sept, 1995	**2nd Payment** Feb/Mar, 1996	**Total Payment per Plaintiff** *Before taxes and attorney's fees	**Total Amount**
Idling Plaintiffs: (1316) Those Union represented plaintiffs, and non-Exempt, non-represented plaintiffs who were not recalled to work at USX on or after February 1, 1987, but who were actively employed just prior to the work stoppage on July 31, 1986.	$10,475.00	$16,075.00	**$26,500.00***	$34,874,000.00
Recalled Idling Plaintiffs: (55) Those Union represented plaintiffs who were recalled to keep the plant on hot idle on or after February 1, 1987.	$4,744.00	$7,256.00	**$12,000.00***	$ 660,000.00
Managers: (50) Management plaintiffs who were recalled or were working on or after February 1, 1987.	$4,744.00	$7,256.00	**$12,000.00***	$ 600,000.00
Laid Off Managers: (14) Management plaintiffs who were laid off prior to December 31, 1986 and not recalled to work on or after February 1, 1987.	$13,045.00	$19,955.00	**$33,000.00***	$ 462,000.00
Recall Plaintiffs: (211) Union represented plaintiffs who were laid off prior to July 31, 1986 and who were not recalled to work on or after February 1, 1987.	$11,752.00	$17,978.00	**$29,730.00***	$ 6,273,030.00
LaRoche: (28) Union represented plaintiffs who were sold to LaRoche Industries in May, 1986.	$4,744.00	$7,256.00	**$12,000.00***	$ 336,000.00
			Subtotal	$43,205,030.00
			Costs	$ 1,841,400.00
			Reserve	$ 1,453,570.00**
			Total	**$46,500,000.00****

***These amounts may be increased by pension payments and hearings proceeds if applicable.**

**Amounts will be increased by $500,000.00 if all claims are resolved by the date of the second payment.

Appendix F

Hearing Worksheet for Idling Plaintiffs

Settlement				Plaintiff
$36,072.00		Average Wage for years 1984-1986		$_____
0.53	x	194/365 days (percentage)	x	0.53
$19,118.00		Average Lost Wage (Gross)		$_____
$ 1,500.00	-	Deductions: Wages Paid (2/16-8/31/87)	-	$_____
$ 1,500.00	-	Sub (2/16-8/31/87)	-	$_____
$16,118.00		Total Gross Wage Loss		$_____
1.644	x	Compound Interest	x	1.644
$26,500.00		**Total Damages** (Incl. Int & Atty's Fees)		_____

If your calculations exceed $26,500.00 then you should probably request a hearing. If your calculations do not exceed $26,500.00 you may still request a hearing if you have special facts or circumstances which may entitle you to additional money from the surplus fund.

Appendix G

FINAL GROSS PAYOUT BY GROUP

Plaintiff Groups All payments are before taxes and attorneys' fees	1st Payment Sept. 1995	2nd Payment Mar. 1996	Total Payment per Plaintiff *Before taxes and attorney's fees	Total Amount
Idling Plaintiffs: (1320) Those Union represented plaintiffs and non-Exempt, non-represented plaintiffs who were not recalled to work at USX on or after February 1, 1987, but who were actively employed just prior to the work stoppage on July 31, 1986.	$10,475.00	$16,025.00	$26,500.00①	$34,980,000.00
Recalled Idling Plaintiffs: (54) Those Union represented plaintiffs who were recalled to keep the plant on hot idle on or after February 1, 1987.	$4,744.00	$7,256.00	$12,000.00①	$648,000.00
Managers: (44) Management plaintiffs who were recalled or were working on or after February 1, 1987.	$4,744.00	$7,256.00	$12,000.00①	$528,000.00
Laid Off Managers: (17) Management plaintiffs who were laid off prior to July 31, 1986 and who were not recalled to work on or after February 1, 1987.	$13,045.00	$19,955.00	$33,000.00①	$561,000.00
Recall Plaintiffs: (214) Union represented plaintiffs who were laid off prior to July 31, 1986 and who were not recalled to work on or after February 1, 1987.	$11,752.00	$17,978.00	$29,730.00①	$6,362,220.00
LaRoche: (28) Union representatives who were sold to LaRoche Industries in May, 1986.	$4,744.00	$7,256.00	$12,000.00①	$336,000.00
			Subtotal	$43,415,220.00②
			Costs	$ 1,805,731.00
			Hearings Awards	$ 2,349,332.28②
			Minus Cost Charge③	$ 570,283.28
			Total	$47,000,000.00

Gross Amount Awarded	$47,000,000.00	Fees	$45,194,269.00
Costs	$ 1,805,731.00	Calculation	divided by 3
Net to be divided	$45,194,269.00	Attorneys Fees=	$15,064,756.33④

① Amounts may be increased by pension payments and hearings proceeds.
② Attorney's Fees were taken from these amounts minus the cost charges only (See calculation above).
③ The Cost Charge came from amounts subtracted from clients who did not pay their costs. This sum was distributed by Judge Daniels as part of the hearings proceeds.
④ Fees were divided between Young & Kester, Spence, Moriarity & Schuster, Plotkin & Jacobs, Lynn C. Harris, Doug Baxter, Vickie Rinne, Michael Goldsmith, Bill Corbet and Howard Eglett.

Appendix H

Settlement Summary for Bill Wright

Sign in front of a witness and return on or before February 26, 1996, only if it is correct.

Your Second Payment Gross Amount is $17,978.00 (before taxes and attorney's fees).

By looking at the page four Chart entitled Final Gross Payout by Group, you can determine your category. You can also see how the two payments combined total the amount promised in our meetings and in the release agreements. The total amount received was increased by the return of any costs you paid and it may be increased if you received an award from the hearings process. The total amount received is reduced by your attorney's fees of 33 1/3%, unpaid costs and the hearings fees charge, if any. Also, some taxes (usually not enough) have been and will be withheld from your gross installment checks by USX. The following paragraphs detail your upcoming check:

Calculation of Second Installment Check (before taxes):				
Second Payment Gross Amount:		**$17,978.00**		
Less Unpaid Costs ($1,100 - Costs paid):	-	$0.00		
		$17,978.00		
Less Atty's Fees (1/3 of Gross - Unpd Costs):		$5,992.67		
		$11,985.33		**$11,985.33**
Less Attorney's Fee on Pension#		$0.00		
Less Hearings Fee (if applicable)		$100.00		
Total costs		$100.00	-	$100.00
				$11,885.33
Add Hearings Amount (if any)^	+	$7,411.93		
Less Atty's Fee on Hearing Amt (1/3 of Amt)-		$2,437.31		
Hearing Amount subtotal		$4,974.62	+	$4,974.62

Gross Check Amount to You (*before Taxes*) $16,859.95*

I, Bill Wright, do hereby accept and understand the breakdown set forth above and that my share of the final settlement proceeds arising from Pickering v. U.S.X. and related cases is **$16,859.95.*** I ask that my check be mailed to the address above on or about March 4, 1996, and I do hereby acknowledge that the figures above are correct, and I do hereby release my attorneys from any claim relating to the settlement.

SIGNED and DATED this 22 day of February, 1996.

Address 273 So 200 W
Payson UT 84651
801-465 9607

Bill Wright
Soc Sec #: REDACTED

Witnessed by: Blaine L Wright Witness name printed: Blaine L. Wright

#We reserve the right to collect additional attorney's fees on any definable benefit as a result of increased pension rights received as a result of the Pickering litigation.

*We reserve the right to change this number if a significant calculation error or category error is made, only after notice to and a meeting with the client.

^A copy of Judge Daniel's brief ruling about your individual case, and the case in general, is available upon request.